

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 24,545

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Review of an Order of
The Federal Aviation Administration

APPENDIX

ates Court of Appeals
District of Columbia Circuit

JAN 25 1971

San J. Paulson
JPM

HERBERT A. LEVY
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(i)

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APPENDIX

CHRONOLOGICAL LIST OF
RELEVANT DOCUMENTS

<u>Date</u>	
1970	
February 15,	Complaint Filed
February 19,	Matter Set for Investigation
March 5,	ALPA Statement of Position Filed
April 15,	FAA Supervising Inspector Issued Report
May 20,	FAA Denial of Complaint
June 2,	ALPA Request for Reconsideration
June 23,	FAA Denial of Request for Reconsideration

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION

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In the Matter of the Complaint of)
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AIR LINE PILOTS ASSOCIATION,)
INTERNATIONAL)
)
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against)
)
)
MOHAWK AIRLINES, INC.)

STATEMENT OF POSITION
on behalf of
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

* * * * *

PRELIMINARY STATEMENT

This complaint was filed with Administrator John H. Shaffer of the Federal Aviation Administration on behalf of the Pilots of Mohawk Airlines, as

represented by the Air Line Pilots Association, International (hereinafter referred to as the "Association") by telegram dated February 15, 1970.

By telegram dated February 19, 1970, the Federal Aviation Administration acknowledged the safety complaint filed against Mohawk Airlines and set the matter for investigation.

The acts of Mohawk Airlines, Inc., (hereinafter referred to as "Mohawk") reveal a consistent pattern of conduct which violates several Federal Aviation Regulations, as discussed below, as well as the policies of the Federal Aviation Act designed to promote and assure air safety as stated in §§ 102(b), 102(e), 103(a) and 103(c) (72 Stat. 740, 49 U.S.C. 1302 and 1303) of the Act.

The Federal Aviation Administration is requested to conduct a thorough investigation of the matter described herein and to fashion a suitable remedy for the protection of the air traveling public and the Pilots of Mohawk Airlines.

I

THE FACTS

Mohawk's unlawful and unsafe course of conduct is best illustrated by recent incidents involving individual Mohawk captains.

A. "THE KROUK INCIDENT"

On August 2, 1969, Mohawk Captain Bernard Krouk was scheduled to fly Mohawk Aircraft 32J (BAC 1-11) on Flights 42 and 43 (Albany, New York, Syracuse, New York, Washington, D. C., Syracuse, New York, Utica, New York, and Albany, New York). Weather information indicated the existence of severe frontal activity throughout the Mohawk system and lines of thunderstorms were reported along several of the route segments of flights 42 and 43.

Prior to take off, Captain Krouk was aware of several Minimum Equipment List placards on the aircraft. The flight release indicated that a number 2 top temperature control was inoperative, the right auto-fueler was inoperative above 5,200 pounds, and the auto-pilot was "O.K." in the yaw damper mode only. Captain Krouk signed the flight release.

During the first segment, Captain Krouk discovered that, contrary to the information which he had been furnished, the auto-pilot was inoperative in the yaw damper mode. Upon the discovery of this discrepancy and based upon the current weather information, Captain Krouk concluded that the frontal activity reported between Syracuse and Washington could not be safely penetrated with a fully inoperative auto-pilot; this conclusion was also consistent with existing manual provisions. Accordingly, he requested by radio that Mohawk's flight control personnel provide auto-pilot capability at Syracuse, New York, or in the alternative, that Mohawk provide a replacement aircraft at Syracuse for completion of the flight assignment.

Upon arrival at Syracuse, Captain Krouk learned that both his alternative requests were rejected. Declining the Company's request to continue the flight with aircraft 32J in its then existing mechanical condition, Captain Krouk determined that the flight should not be continued under the circumstances, in the interest of safety.

After a delay in Syracuse, Flight 42 was then cancelled.

Captain Krouk offered to ferry aircraft 32J to Utica, New York, but before arrangements could be made to ferry or otherwise make provision for movement of aircraft 32J, Captain Krouk was advised by a Mohawk Division Chief Pilot that he was being immediately removed from the line.

On August 4, 1969, Captain Krouk met with Mohawk management to discuss the circumstances resulting in his removal from the line. A further

meeting was scheduled for August 5, 1969, to discuss the maintenance and dispatch discrepancies. At the August 5 meeting Captain Krouk was presented with a letter, signed by the Mohawk Chief Pilot, which removed Captain Krouk from line flying for fifteen days and penalized him with loss of all pay during that period of time. The penalty was based upon the allegation that Captain Krouk lacked "consideration for the inconvenience caused a number of passengers" and that he disregarded the "economic impact" upon Mohawk Airlines. A true copy of the Company's August 5 letter is attached.

A labor-management grievance proceeding is presently pending concerning the propriety of Mohawk's actions in imposing the discipline referred to above.

At the termination of the fifteen day suspension period, Captain Krouk was returned to line flying.

B. "THE ORR INCIDENT"

On January 28, 1970, Captain Robert Orr was scheduled to command Mohawk Flight 158 from Buffalo, New York, to Newark, New Jersey, using aircraft 28J(BAC 1-11). Earlier in the day, aircraft 28J had been used for Flight 132, Buffalo to Newark and Flight 131, Newark to Buffalo to Toronto. Flight 158 left Toronto and was scheduled to Buffalo (where Captain Orr was to assume command) and then to Newark.

Upon his arrival at the airport, Captain Orr was advised that Flight 158 was 25 minutes late and had, on descent and approach to Buffalo, encountered severe turbulence. Captain Orr began a weather check, and the earlier reports of high winds and freezing rains he had received at his home were confirmed by turbulence forecasts, pilot reports of turbulence in the area and forecasts of moderate to severe turbulence issued by the Mohawk dispatch office.

When Captain Orr read the flight release for aircraft 28J, he discovered that the aircraft had been released with an inoperative autopilot. Captain Orr then phoned the dispatch office in order to determine the actual status of the autopilot. He was advised by dispatch that the maintenance department reported the autopilot operative based on a statement by the Mohawk Chief Pilot who stated that he had checked the autopilot earlier in the day and that it had operated properly except for a tendency to disengage more easily than normal.

Captain Orr then asked the dispatcher at Buffalo to contact the Mohawk Captain at Toronto scheduled to fly Flight 158 to Buffalo to determine the actual and then status of the autopilot. Since Captain Orr could inquire directly of the Captain flying to Buffalo upon his arrival, it was decided not to call Toronto and possibly delay Flight 158.

Captain Orr then completed a weather briefing and the flight plan for his trip.

When Flight 158 arrived in Buffalo, Captain Orr entered the cockpit and upon inquiring about the status of the autopilot, he was advised by the Captain who had just flown the Toronto to Buffalo segment that the autopilot was inoperative. Captain Orr was further advised that no attempt had been made to use the autopilot since the master switch had been turned off and the circuit breakers had been pulled.

Captain Orr then phoned Utica maintenance and was told, in response to his inquiry about the autopilot, that Mohawk's Chief Pilot had flown the aircraft earlier and had reported it as functional except for its tendency to disconnect more easily than normal.

Captain Orr requested maintenance personnel to reconnect the autopilot and have it signed off as operative before accepting the aircraft for flight through

the turbulent condition which had been reported and confirmed. Maintenance advised Captain Orr that there would be sufficient information in the log book to reinstate the autopilot and sign it off since the Chief Pilot had flown the aircraft earlier that day. Captain Orr returned to the aircraft accompanied by a Mohawk mechanic in order to examine the log book for the purpose of reinstating the autopilot. The examination of the log book revealed that not only had the aircraft's autopilot not been checked that day by the Chief Pilot, but no entries had been made since February 26, 1970, when the equipment had been listed as inoperative.

Captain Orr then requested the mechanic to check the log book with Utica maintenance to rectify the discrepancies, since no entries indicated that the Chief Pilot had ever flown the aircraft or that the autopilot had been signed off as operative.

The passengers of Flight 158 were advised by Captain Orr of the delay and they were informed that due to turbulence, it was necessary to reinstate the autopilot before departing for Newark. Arrangements were made by Captain Orr with the Buffalo dispatch office to switch equipment. A clean (no items on the Minimum Equipment List) aircraft was available and Captain Orr prepared for continuation of Flight 158. An agent then advised Captain Orr to return a call to the Mohawk Chief Pilot, who had allegedly flown aircraft 28J earlier in the day.

During the conversation with the Chief Pilot, no explanation of the alleged checking of the auto pilot was offered. Captain Orr was asked whether he was refusing to fly the aircraft and he replied that under the present turbulent conditions, he considered it unsafe and would not fly the aircraft with an autopilot inoperative in all modes.

The Chief Pilot then advised Captain Orr that he was being removed from the line immediately. The Chief Pilot indicated that he had no choice but to impose the removal.

After a brief Company investigation, Captain Orr, by letter dated January 29, 1970, was removed from service for fifteen days with loss of all pay. The penalty was imposed based upon the accusation that Captain Orr lacked "consideration for the inconvenience caused numerous passengers" and disregarded the "economic impact" upon Mohawk Airlines. A copy of the Company's January 29, 1970, letter is attached.

A labor management grievance proceeding is presently pending concerning the propriety of Mohawk's actions in imposing the discipline referred to above.

II

DISTINCTION BETWEEN THIS COMPLAINT AND PENDING GRIEVANCE PROCEEDINGS

This complaint does not seek relief personal to Captains Krouk and Orr, such as reimbursement for lost pay or deletion of the disciplinary action from the pilot's personnel files. That relief, retrospective in its nature, is sought in the grievance proceedings.

This complaint has instead a completely different subject matter and is addressed to wholly different relief, prospective in content.

From FAA, this complaint seeks a prospective remedy in the public interest, to insure that air safety will not be jeopardized on subsequent Mohawk flights by the practices to which this complaint is addressed.

If, as we believe, the FAR establishes that the pilot-in-command has the ultimate authority to determine whether a flight may be safely undertaken

under all the circumstances known to him, and if, as we believe, that authority has been seriously compromised and indeed submerged by Mohawk's use of disciplinary action in the instances we have cited, there is then a serious likelihood that other Mohawk flights have been and are being undertaken under unsafe conditions.

That likelihood directly threatens the safety of the traveling public. Immediate FAA action is urgently needed.

III

SECTIONS OF THE REGULATIONS VIOLATED BY MOHAWK

The Federal Aviation Regulations reviewed below are all illustrative of the principle that the pilot in command of an aircraft is the *final* authority for determining whether a given flight may be safely undertaken under the known circumstances. Those regulations also demonstrate the substantial responsibilities conferred by FAA upon the pilot in command to determine ultimately the immediate safety issues posed on any given flight.

Section 121.597 of the Regulations, subparagraph (b) provides in pertinent part:

"No person may start a flight unless the pilot in command . . . has executed a flight release setting forth the conditions under which the flight will be conducted. The pilot in command may sign the flight release only when he and the person authorized by the operator to exercise operational control believe that the flight can be made with safety."

It is clear that this Section of the Regulations vests absolute discretion in the pilot in command concerning the signing of a flight release for an aircraft.

The FAA never intended that an airline should use disciplinary action to force a pilot to sign a flight release against his own judgment based upon his own training and experience.

In both the Krouk and Orr incidents, the pilots in command exercised the discretion set forth in § 121.597(b) in what can only be described as a rational and reasonable manner, and in each case, the pilot voluntarily stated his reasons for his decisions.

Nevertheless, both Captains Krouk and Orr were severely disciplined upon grounds of "inconvenience" and "economics" for actions reasonably performed in accordance with the obvious meaning and intent of § 121.597(b).

Section 121.663 of the Regulations, relating to the dispatch release, reaffirms the authority of the pilot in command to exercise his discretion in determining that a particular flight can be made in safety.

In Part 91. General Operating and Flight Rules, Section 91.3 provides in the broadest possible terms that the pilot in command of an aircraft is both the final authority and the person directly responsible for the operation of the aircraft. For emphasis, § 91.3(a) is reproduced here:

"§91.3 Responsibility and Authority of the Pilot in Command: (a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft."

Mohawk's actions against Captains Krouk and Orr completely disregarded this Section of the Regulations. The same Chief Pilot in both circumstances substituted his discretion for that of the two pilots in command and overruled the Captain's determination in each case. It is obvious that Mohawk management views itself and not its captains, as the final authority in determining the conditions under which each flight should be released and how it should be operated.

The Association further contends that Mohawk has violated § 91.8 of the Regulations by intimidating, interfering with and threatening all crew members in the performance of their duties.

IV

THE INTIMIDATING EFFECTS OF THE VIOLATIONS

The specific acts described are a sufficient basis for an FAA determination that Mohawk has violated the letter and the spirit of the Regulations and the Act. Although the specific violations are of a serious nature, the acts of Mohawk complained of have a far more dangerous and insidious effect which should be FAA's focus in fashioning a remedy.

There is no adequate way to measure the number of Mohawk flights which have been flown since August 5, 1969, (the date of Captain Krouk's suspension) by pilots in command who, knowing of the punishment meted out to Captain Krouk, have put to one side their own best judgment and instead deferred to Mohawk's known policy of using disciplinary action to compel the clearance and departure of Mohawk flights, without regard to safety. Section 91.8(a) of the Regulations provides:

"No person may assault, threaten, intimidate or interfere with a crewmember in the performance of his duties aboard an aircraft being operated in air commerce."

Mohawk has by its imposition of discipline created an atmosphere in which no pilot can evaluate objectively and independently the safety of each flight assignment without being influenced by the threat of punishment.

In both cited cases, the Captains in command, through diligence and attentiveness to their duties, discovered discrepancies in Company reports concerning the mechanical condition of the assigned aircraft. Both Captains endeavored to take corrective action to the extent within their control, action fully consistent with conservatism, good conscience, and normal operating standards, and when delay necessarily resulted, both were immediately punished.

Mohawk's actions have intimidated all crew members who are aware of the discipline imposed (and all Mohawk pilots are aware of these cases) by creating irrelevant and potentially destructive factors which must now be considered before a flight may be delayed or canceled for legitimate safety considerations.

Mohawk's pattern of conduct represents a reckless invitation to disaster.

Management has indicated that it intends to impose the same disciplinary action against any pilot under the same or similar circumstances.

V

REMEDY

As noted above, no request is made that the Federal Aviation Administration award back pay to the disciplined captains nor is any remedy sought here for the damage done individually to Captains Krouk and Orr.

It is absolutely imperative, however, that remedial action be taken promptly, to provide for the dissipation of the dangerous atmosphere of intimidation created in the past six months by Mohawk's destruction of the lawful authority and independent judgment of the pilot in command.

Accordingly, it is requested that FAA issue an Order

1. Directing Mohawk Airlines, its officers, employees and agents, to cease and desist from any action in any form which does or may interfere with the authority of the pilot in command to make the determinations required of him by FAR §§ 121.597, 121.663, and 91.3;

2. Directing Mohawk Airlines, its officers, employees and agents to cease and desist from further violations of FAR § 91.8; and

3. Directing that Mohawk Airlines post for one year a notice at each pilot domicile in a place readily accessible to pilot personnel, and in addition send a copy of said notice by mail to each Mohawk pilot which notice shall:

1. Set forth the text of FAR §§ 121.597, 121.663, 91.3 and 91.8, and
2. Advise all Mohawk pilots that a Mohawk pilot-in-command is expected by Mohawk to be the final authority in determining whether any flight to which he is assigned may safely be undertaken under all the facts and circumstances known to him; and
3. Stating that the Carrier will take no disciplinary action against any pilot who has discharged his responsibility under the cited provisions of FAR by determining whether or not in his best independent judgment a given flight assignment may safely be undertaken under all the facts and circumstances known to him.

Respectfully submitted,

LEVY & KASHER
Attorneys for
Air Line Pilots Association, Int'l.

Of Counsel:

HERBERT A. LEVY
RICHARD R. KASHER

EXECUTIVE OFFICES

Oneida County Airport, Utica, New York 13503

August 6, 1969

Captain Bernard Krouk
164-67 Highland Road
Jamaica, New York 11432

Dear Captain Krouk:

On August 2, 1969 you delayed flight 42 from Syracuse, New York to Washington, D. C. because of an inoperative automatic

pilot. The aircraft, 32J, was an airworthy aircraft. This delay contributed materially to the cancellation of flight 42 and the entire return portion of flight 43 on the same date.

Due to your lack of consideration for the inconvenience caused numerous passengers and the total disregard for the economic impact upon the Company for this action, you are removed from line flying. This removal, with loss of all pay for a period of fifteen (15) days, will become effective on August 2, 1969 and extend through August 16, 1969.

Sincerely yours,

/s/ C. M. HUNT
Division Chief Pilot-BAC 1-11

cc: Assistant Vice President,
Flight Manager, Crew
Scheduling, Payroll

MOHAWK AIRLINES INC
Executive Offices
Oneida County Airport, Utica, New York 13503

January 29, 1970

Captain Robert Orr
105 Girdle Road
East Aurora, New York 14052

Dear Captain Orr:

On January 28, 1970, you refused to fly flight 158 from Buffalo, New York to Newark, New Jersey because of an inoperative auto pilot. This refusal on your part to fly this flight caused a one hour and twelve minute delay at Buffalo awaiting a replacement captain to fly this flight.

Due to your lack of consideration for the inconvenience caused numerous passengers and the total disregard for the economic impact upon the Company for this action, you are removed

from line flying. This removal with loss of all pay, is for a period of fifteen days and is effective January 28, 1970 through February 11, 1970.

Sincerely yours,

/s/ C. M. HUNT
Division Chief Pilot - BAC 1-11

CMH:sw

cc: Vice President, Flight
Director, Labor Relations
Manager, Crew Scheduling
Payroll

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Air Carrier District Office
Oneida County Airport
Oriskany, New York 13424

Date: 23 March 1970

In Reply Refer to: AO-3

Subject: Proposed change to MOH BAC 1-11 Flight Training
Program regarding use of the yaw damper in recovery from "Dutch Roll"

To: Principal Operations Inspector - MOH

Dutch Roll is usually induced by yaw (however created) and will continue as long as yaw exists. The tendency for this condition to develop is inversely proportional to the mass of air flowing by the vertical control surfaces. The aircraft's inherent damping tendencies diminish at higher airspeeds and altitudes.

The BAC 1-11 has a sweep back of only 20 degrees at the $\frac{1}{4}$ cord. This is considerably less than most other jet aircraft and reduces the tendency to "Dutch Roll". In fact, during

Dutch Roll demonstrations, the aircraft will generally dampen out the yaw after a few oscillations.

I recommend that Mohawk Airlines' procedures for recovery from Dutch Roll be as follows:

1. Engagement of auto pilot yaw damper alone (if operative).
2. Recovery by manual application of aileron alone.

Inspector Zimmerman has read and agrees with the above proposal.

/s/ RUSSELL THETFORD

BAC 1-11 Lead Airman Certification Specialist, EA/ACDO #32

Copies forwarded to W. Osborne and J. O'Brien, ALPA, 8/3/70

26 March 1970

Mr. Jack Mozian
Mohawk Airlines, Master Executive Council
Air Line Pilots Association
N. Y. Council Office, Expressway Bldg.
91-93 Elmhurst, New York 11373

Gentlemen:

This letter is in response to your complaint to the Administrator, dated 16 February 1970, and our meeting in Boston on 5 March 1970. It was our pleasure to meet with yourself and the ALPA MEC.

First, Section V, Paragraph 3 on Page 13 of the complaint, refers to FAR 121.597 and FAR 91.8. The regulations cited do not relate to the complaint. FAR 121.597 is titled "Flight release authority: supplemental air carriers and commercial operators," and applies to supplemental air carriers only. FAR 91.8, "Prohibition against interference with crewmembers," is not applicable, since this regulation refers to interference with crewmembers during performance of duties aboard aircraft, and not at any other time or place.

As stated to the MEC during our meeting on 5 March 1970, at Logan Airport, the FAA is taking two steps in reaction to your presentation.

First, the FAA is conducting an investigation of your specific complaint relating to safety. Such an investigation is underway at the present time. We expect a report of findings by 16 April 1970.

The second action promised was to meet informally with Mr. R. V. Stephenson, President of Mohawk Airlines. We agreed to inform him of the desire of your membership to seek ways to establish a more satisfactory working relationship between Mohawk pilots and management. That meeting took place on 12 March 1970. Mr. Stephenson was informed about your complaint and our responsibility to find facts to determine if compliance with regulations was maintained in the cases cited.

Your wishes regarding improvement in relations were discussed at length.

Mr. Stephenson expressed keen interest in seeking a solution to the problems, as revealed at the 5 March meeting, and sought suggestions which could result in achieving understandings with the pilot group and all other employees.

I am impressed by the strong desire of yourselves and Mr. Stephenson to improve your appreciation of each other's viewpoints, and I am optimistic about the outcome, based upon expressions on both sides.

Sincerely,

/s/ ROBERT E. JONES
Chief, Flight Standards Branch, BOS-200

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

20 April 1970

AIR CARRIER DISTRICT OFFICE
Oneida County Airport
Oriskany, New York 13424

Date: 15 April 1970

In Reply Refer To: SI-1

Subject: Complaint of ALPA against Mohawk Airlines
(your letter 13 March 1970)

To: BOS-200

Our investigation into the allegations made by the Air Line Pilots Association against Mohawk Airlines has been concluded. The facts as alleged by the pilot group are confirmed to be substantially correct. During the course of the investigation, conferences were had with Mr. R. T. Colliander, Vice President, Flight, on 16 March, and with Captains J. Mozian, B. Krouk, R. Orr, and First Officer Ophee on 27 March 1970. These conferences did not add materially to the presentation given to the FAA initially on 5 March 1970 in Boston.

In their complaint, ALPA alleges violation by the carrier of sections 91.3(a), 91.8(a), 121.597(b) and 121.663 of the Federal Aviation Regulations.

FAR 91.3(a) RESPONSIBILITY AND AUTHORITY OF THE PILOT IN COMMAND. The pilot in command of an aircraft is directly responsible for, and is the final authority to, the operation of that aircraft (underscoring supplied).

Comment: The ALPA group contends that a violation of this section occurred by the carrier's actions against Captains Krouk and Orr. According to the definition in Part 1 of the FARs, the term operate with respect to aircraft means, "Use, cause to use, or authorize to use for the purpose (except as provided in 91.10 of this chapter) of air navigation including the piloting of aircraft with or without the right of legal control (as owner, leasee or otherwise)." Inasmuch as neither Captain Krouk nor Captain Orr (used) operated their aircraft, there could not be a violation of this section.

Moreover, in this instance both Captains in fact were the final authority as to the operation of their respective aircraft in that their decision not to operate was not overcome by the carrier's threats of reprisal.

FAR 91.8(a) PROHIBITION AGAINST INTERFERENCE WITH CREW-MEMBERS. No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of his duties aboard an aircraft being operated in air commerce.

Comment: Again applying the definition of operate we find that the aircraft was not (used) operated which would be a necessary action for sustaining violation of this section.

FAR 121.597(b) FLIGHT RELEASE AUTHORITY: SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS.

Comment: Inasmuch as this section is applicable to a domestic carrier only when it is being operated on charter flights or other special service operations, which is not the case here, no comment is needed. The violation, if any, would flow from section 121.663 which is also cited in the complaint.

FAR 121.663 RESPONSIBILITY OF DISPATCH RELEASE: DOMESTIC AND FLAG AIR CARRIERS. Each domestic and flag air carrier shall prepare a dispatch release for each flight between specified points, based on information furnished by an authorized aircraft dispatcher. The pilot in command and an authorized aircraft dispatcher shall sign the release only if they both believe that the flight can be made with safety. The aircraft dispatcher may delegate authority to sign a release for a particular flight, but he may not delegate his authority to dispatch.

Comment: In the instances cited in the ALPA brief, neither Captain Krouk nor Captain Orr agreed that the flight could be conducted in safety; therefore neither undertook to conduct the flight. Since this section requires mutual agreement between the pilot in command and the aircraft dispatcher before the aircraft can be properly dispatched; and since this agreement was not reached; and inasmuch as the aircraft was not (used) operated, there can be no violation of this section.

In any case, there cannot be a violation of either Part 91 or Part 121 unless it can be shown that these Parts in themselves are applicable to a particular situation.

FAR 91.1 APPLICABILITY. (a) * * * This Part prescribes rules governing the operation of aircraft * * * within the United States.

Comment: Once again, before any section of 91 can be applied it must be shown that the aircraft was operated within the definitions supplied by Part 1.

FAR 121.1 APPLICABILITY. (a) * * * This Part prescribes rules governing the certification and operations of * * *.

Comment: Again, before we can apply any section of Part 121 to any situation, it first must be determined there was an operation within the meaning supplied by Part 1 above.

Although our examination does not show that the carrier was in violation of any of the specific regulations cited in the ALPA brief, it does raise the question of the carrier's fitness to continue to hold their Operating Certificate under the atmosphere of hostilities, real and imagined, that are caused by their running labor/management disputes. To examine this proposition would require an effort on the order of a Blue Ribbon Inspection under the authority of section 121.81. A Blue Ribbon Inspection was had about six years ago on an identical complaint by the pilot group. At that time the FAA was unable to demonstrate a measurable cause/effect relationship on air safety by the dispute. It is our opinion that the situation today is little different than it was then. Therefore, we are not ready, at this time, to recommend such a step. Instead, we would recommend that ALPA be advised of our conclusions on each of the specific areas but without meeting the general issue of "the impact of company harassment on safety" head on.

Finally, with regard to the query in your memorandum concerning our position on the use of auto pilot yaw dampers, your attention is invited to the attached memoranda prepared by the Lead BAC 1-11 Specialist.

We are returning original papers plus all the documentary evidence accumulated during our investigation.

/s/ G. L. HOWARD
Supervising Inspector, EA/ACDO # 32

Attachments

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

May 4, 1970

BOSTON AREA OFFICE
154 Middlesex Street
Burlington, Massachusetts 01803

Date: April 30, 1970

In Reply Refer to: BOS-200

Subject: Complaint of the Air Line Pilots Association Against
Mohawk Airlines dated 5 March 1970

To: Supervising Inspector, Utica ACDO

Please review and comment on the enclosed material on the above subject. Your comments should reach this office not later than 14 May 1970.

/s/ ROBERT E. JONES
Chief, Flight Standards Branch, BOS-200

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AIR CARRIER DISTRICT OFFICE
Oneida County Airport
Oriskany, New York 13424

Date: 12 May 1970

In Reply Refer To: SI-1

Subject: Complaint of the Air Line Pilots Association Against
Mohawk Airlines dated 5 March 1970 (BOS-200 Ltr.
Dtd. 4-30-70).

To: BOS-200

We concur. The proposed letter accurately reflects the views of this office.

/s/ G. L. HOWARD, Supervising Inspector, EA/ACDO 32 Attachment

MINIMUM EQUIPMENT LIST

BAC 1-11
(All Models)

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- NOTE: (1) Asterisk (*) requires inoperative unit or components to be placarded.
- (2) Hash Mark (#) requires appropriate procedures to be established, published and complied with if flight is accomplished with item inoperative.
- (3) Dash (-) in Column 1 indicates a variable quantity.
- (4) Definitions for the purpose of this list.
- A. "VFR conditions" means VFR atmospheric conditions for the area of flight and does not pertain to the dispatch release, flight plan or clearance.
- B. "Icing Condition" means the atmospheric environment is such that ice can form on the aircraft or in the engine.
- C. "Regulations" means the applicable portions of the Federal Aviation Act and Federal Aviation Administration Regulations in force during the flight.

FEDERAL AVIATION ADMINISTRATION

MINIMUM EQUIPMENT LIST

AIRCRAFT:

BAC 1-11

REVISION NO. 3

DATE: May 17, 1968

PAGE

22-1

SYSTEM &
SEQUENCE
NUMBERS

ITEM

1. REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT
AS PROVIDED IN COLUMN 2

2. REMARKS AND/OR EXCEPTIONS

22. AUTOPILOT

-1 Autopilot disconnect light

2

The whole autopilot system may be inoperative
at all times.-2 Control wheel autopilot
disengage button

2

At least one must be operative if autopilot
is used in any mode.

-3 Glide slope annunciator

1

* One may be inoperative provided use of
autopilot restricted to 10,000 feet MSL
or above.○ Torque Limiter Adapter
(Autopilot pitch monitor
system is installed)

1

Required only if autopilot used for
coupled approach.

AVAILABLE

al bound volume

FEDERAL AVIATION ADMINISTRATION

MINIMUM EQUIPMENT LIST

AIRCRAFT:		REVISION NO. 3		PAGE
BAC 1-11		DATE: May 17, 1968		27-1
SYSTEM & SEQUENCE NUMBERS	ITEM	1.	REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT AS PROVIDED IN COLUMN 2	
			2. REMARKS AND/OR EXCEPTIONS	
27.	<u>FLIGHT CONTROLS</u>			
-1	Feel unit (Rudder and elevator)	2		
-2	TPI indicator	1	* May be inoperative provided a visual check determines that the trim wheel index correctly indicates horizontal stabilizer position prior to dispatch.	
-3	Flap position indicator needles	1		
-4	Primary shaft failure warning lights	1		
-5	Flying control fail warning	2		
-6	Flap track fairings	6		
-7	Wing fences	2		
-8	Spoilers	4		
-9	Lift dumpers	0	* Subject to airfield performance limitations. (See Approved Airplane Flight Manual). If one inoperative, entire system must be deactivated.	
-10	Series Yaw Damper	0		

MINIMUM EQUIPMENT LIST

AFT:

BAC 1-11

REVISION NO. 5

DATE: Jan. 26, 1970

PAGE.
27-2

SYSTEM & SEQUENCE NUMBERS	ITEM	1. REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT AS PROVIDED IN COLUMN 2	2. REMARKS AND/OR EXCEPTIONS
-11	Stall warning sensing system	2	
-12	Stick shaker motors	1	
-13	Stall identification sensing (stick pusher)	1	
-14	Takeoff configuration warning horn	1	
-15	H.P. pressure gauge	1	* May be inoperative provided bottle pressure checked prior to every release.
-16	L.P. pressure gauge	1	* May be inoperative provided low pressure warning light operative.
-17	Stall warning heater lights and stall identification heater lights	4	#* One stall warning heater light and one stall identification heater light may be inoperative provided aircraft not dis- patched into known icing conditions and sensor (vane) heaters are operative.
-18	Stall warning sensor (vane) heaters	4	
-19	Klaxon	1	* Not required if stall identification (stick pusher) system operative.
-20	Low pressure light emergency elevator system	1	
-21	Failure light emergency elevator system	1	
-22	Electric trim system	1	#* May be inoperative provided Trim Tab is visually checked for faired position.
-23	Electric Trim System Indicator	1	#* May be inoperative provided Trim Tab is visually checked for faired position prior to each takeoff.

MINIMUM EQUIPMENT LIST

DRAFT:

BAC 1-11

REVISION NO. 5

DATE: Jan. 26, 1970

PAGE

27-3

SYSTEM & SEQUENCE NUMBERS	ITEM	1. REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT AS PROVIDED IN COLUMN 2	2. REMARKS AND/OR EXCEPTIONS
-24	Elevator Damper Engaged Light	1	<p data-bbox="935 725 1544 763">#* May be inoperative, provided:</p> <p data-bbox="999 801 1665 960">(1) Before each take-off flight crew shall perform feel check of #1 elevator system to assure it is in normal power mode.</p> <p data-bbox="1286 997 1341 1028">and</p> <p data-bbox="999 1065 1724 1229">(2) On the ground, if gusty conditions exist, verification must be made that elevator gust damper is en- gaged.</p>

FEDERAL AVIATION ADMINISTRATION

MINIMUM EQUIPMENT LIST

AIRCRAFT:		REVISION NO. 3		PAGE
BAC 1-11		DATE: May 17, 1968		70-1
SYSTEM & SEQUENCE NUMBERS	ITEM	1.	REQUIRED FOR ALL FLIGHT CONDITIONS EXC AS PROVIDED IN COLUMN 2	
			2. REMARKS AND/OR EXCEPTIONS	
70.	<u>POWER PLANT, EQUIPMENT AND SYSTEMS</u>			
-1	Fuel flow meter	2	*) One LP rpm, one HP rpm, one fuel) flow or one EPR (PT-7) gauge may) be inoperative provided not more) than one of the above for each) engine is inoperative. Same) gauge may not be inoperative on) both engines.	
-2	LP rpm	2		
-3	HP rpm	2		
-4	EPR or PT-7 gauge	2		
-5	E.G.T. gauge	2		
-6	Oil pressure indication	2		
-7	Oil pressure warning light	0	* Oil pressure indicator must be monitored during engine operation.	
-8	Oil temperature indicating	2		
-9	Vibration system	0	*	
-10	Thrust reverser	0	*	
-11	Thrust reverser unlocked light	0	* If inoperative, establish a procedure to determine that the related thrust reverser is locked in the closed (forward thrust) position.	

FEDERAL AVIATION ADMINISTRATION

MINIMUM EQUIPMENT LIST

AIRCRAFT:

BAC 1-11

REVISION NO. 3

DATE: May 17, 1968

PAGE

70-2

SYSTEM &
SEQUENCE
NUMBERS

ITEM

1. REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT
AS PROVIDED IN COLUMN 2

2. REMARKS AND/OR EXCEPTIONS

-12 Ignitors

4

-13 H.E. Ignitor lights

0

* Check ignitors audibly.

-14 The LP shaft rotation
indicator

0

* Shaft rotation must be checked visibly
or by L.P. RPM indicator.

-15 Top temperature control

2

* May be inoperative provided EGT is
controlled by throttle.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

BOSTON AREA OFFICE
154 Middlesex Street
Burlington, Massachusetts 01803

[Filed May 20, 1970]

Levy and Kasher
Federal Bar Building, West
1819 H Street, N.W.
Washington, D.C.

Gentlemen:

Complaint of the Air Line Pilots Association Against
Mohawk Airlines dated March 5, 1970

The purpose of this letter is to inform you of the results of our investigation of the allegations made in the subject complaint.

The preliminary statement makes reference to certain sections of the Federal Aviation Act. The sections cited are as follows:

Sections 102(b) and 102(e) – These sections refer to a declaration of policy which apply to the Civil Aeronautics Board and therefore are not appropriate for the Federal Aviation Administration to comment upon.

Sections 103(a) and 103(c), (72 Stat. 740, 49 U.S.C. 1303) – These sections are part of the declaration policy with which the Administrator of the Federal Aviation Administration is charged under the Act. Your complaint contains no specific example of FAA failure to perform as required nor any recommendation as to how the Administrator could more effectively regulate air commerce.

The client's basic charge seems to be contained under the heading titled "THE FACTS." It is stated therein that "Mohawk's unlawful and unsafe course of conduct is best illustrated by recent incidents involving individual Mohawk captains."

The complaint is totally based upon the incidents of Captain Orr and Captain Krouk. We have not been able to find any violations of the Federal Aviation Regulations in the examples provided in the complaint nor have we been able to determine that Mohawk Airlines did not conduct their operations in

accordance with existing regulations. A report of the investigating inspector is enclosed for your review. It deals specifically with the alleged violations of regulations cited in your complaint.

It is apparent that your problems are in the management/employee relationship area. This is the type of matter which most effectively can be negotiated to a satisfactory conclusion by the parties involved. It is understood that certain steps have been taken by both management and the pilot group to provide for constructive discussions concerning areas of disagreements such as you have presented. That is the best way to resolve the issues which you have brought to our attention.

Where severe grievances remain unresolved, safety in flight operations may be subject to decay. While conditions do not warrant more active participation by the FAA in your situation at this time, surveillance will be continued with the object of determining if safety is maintained at a satisfactory level. Should safety in this area be affected adversely, the entire matter will be reviewed and other means of corrective action sought.

It is unfortunately not always pleasant to carry out one's responsibilities. Regulations require a pilot-in-command to conduct flight operations within the limitations imposed by those regulations. This includes prohibitions against operation of aircraft which are not in an airworthy condition. A professional airline pilot should be able to make such accurate determinations within the operational setting existing at Mohawk Airlines.

If demands are made which are in excess of the minimums required by regulation, as in this case, then management of that company may elect to question your adherence to company policies.

The FAA has certificated the BAC 1-11 aircraft without a requirement for series yaw damper. The FAA approved MEL permits operations without an autopilot yaw damper. These decisions were reviewed and were found to be consistent with safe practice. Your company's manuals now reflect those views with appropriate operational and training procedures.

We would be happy to discuss the details of the investigation at any time.

Sincerely,

/s/ ROBERT E. JONES
Chief, Flight Standards Branch, BOS-200

Enclosure



Telegram

NO. WDS. - CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	<input type="checkbox"/> OVER NIGHT TELEGRAM UNLESS BOX ABOVE IS CHECKED THIS MESSAGE WILL BE SENT AS A TELEGRAM

Send the following message, subject to the terms on back hereof, which are hereby agreed to

TO Robert E. Jones

June 2 1970
CARE OF
OR APT. NO.

STREET & NO. Federal Aviation Administration-157 Middlesex Rd. TELEPHONE

CITY & STATE Burlington, Massachusetts

ZIP CODE 01801

ALPA requests reconsideration of your May 20, 1970 disposition of March 5 complaint against Mohawk, in review of Mohawk's continuing determination to punish pilots in command for refusal to accept flights considered unsafe. Mohawk Captain F. Delmar removed from service pending anticipated disciplinary action for refusing to operate Flight 63, May 27, Buffalo-MSP through forecast thunderstorm activity with fully inoperative autopilot. Reconsideration by FAA urgently necessary to avoid possible tragedy resulting from intimidating effects on Mohawk pilots.

Herbert A. Levy

SENDER'S TEL. NO. 293-3850

NAME & ADDRESS Herbert A. Levy -- 1819 H St., N. W.
Washington, D. C.

WU 1207 (R 5-60)

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

BOSTON AREA OFFICE
154 Middlesex Street
Burlington, Massachusetts 01803

[Filed June 23, 1970]

Mr. Herbert A. Levy
Levy and Kasher
Federal Bar Building, West
1819 H Street, N. W.
Washington, D. C.

Dear Mr. Levy:

This is in reply to your telegram of 2 June 1970, relative to the Krouk and Orr removals.

A thorough review has been made of our position and findings set forth in a letter to you dated 20 May 1970. We wish to inform you that our conclusions are reaffirmed.

Thank you for your interest.

Sincerely,

/s/ ROBERT E. JONES
Chief, Flight Standards Branch, BOS-200

[Filed July 17, 1970]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[14 CFR Part 121]

[Docket No. 9571; Reference Notice 69-19]

AUTOPILOTS FOR CERTAIN TURBOJET AIRPLANES

Withdrawal of Notice of Proposed Rule Making

The purpose of this notice is to withdraw notice No. 69-19 (34 F.R. 7333) in which the FAA solicited comments on a proposed amendment to Part 121

of the Federal Aviation Regulations that would have prohibited a certificate holder from operating a turbojet airplane after January 1, 1970, unless the airplane was equipped with an approved autopilot system that was operative in all axes. The proposal would have permitted the continuance of a flight as planned to a place where repair or a replacement could be made in the event the autopilot malfunctioned or became inoperative.

In light of all the comments received, the FAA has concluded that the subject requires further study and that rule-making action on the proposed amendment is not appropriate at this time. Accordingly, the FAA has determined that notice No. 69-19 should be withdrawn.

The withdrawal of this notice, however, does not preclude the FAA from issuing similar notices in the future nor commit the FAA to any course of action.

In consideration of the foregoing, the notice of proposed rule making published in the Federal Register (34 F.R. 7333) on May 6, 1969, and circulated as notice No. 69-19, entitled "Autopilots for Certain Turbojet Airplanes", is hereby withdrawn.

This withdrawal is issued under the authority of section 313(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1354(a)) and section 6(c) of the Department of Transportation Act (49 U.S.C. 1655(c)).

Issued in Washington, D.C., on June 22, 1970.

William G. Shreve, Jr.
Acting Director,
Flight Standards Service.

(As published in the Federal Register [35 F.R. 10527] on June 27, 1970)
[2298]

[Filed August 17, 1970]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AIR LINE PILOTS ASSOCIATION,)	
INTERNATIONAL,)	
<i>Petitioner,</i>)	
v.)	Petition for Review
FEDERAL AVIATION ADMINISTRATION,)	No. 24,545
<i>Respondent.</i>)	

PETITION FOR REVIEW

The Air Line Pilots Association, International, hereby petitions this Court to review and set aside an Order of the Federal Aviation Administration dated May 20, 1970, which dismissed the Complaint of the Air Line Pilots Association, International, against Mohawk Airlines, dated February 15, 1970, and to remand the matter for further proceedings before Federal Aviation Administration, with instructions. That complaint alleged that Mohawk Airlines violated several provisions of the Federal Aviation Regulations by imposing disciplinary action upon certain pilots-in-command of Mohawk Airlines for refusing to undertake flight assignments which they had independently judged to be unacceptable by reason of unsafe conditions. An application by Petitioner for rehearing of the Order sought to be reviewed herein was denied by Respondent on June 23, 1970.

Respectfully submitted,

HERBERT A. LEVY
*Attorney for Air Line Pilots
Association, International*

Office and Post Office Address
1819 H Street, N. W.
Washington, D. C. 20004
202/293-3850

Dated: August 17, 1970

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Review of an Order of the
Federal Aviation Administration

BRIEF FOR
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 29 1971

Nathan J. Paulson
CLERK

HERBERT A. LEVY

ANGELO V. ARCADIPANE

Attorneys for Petitioner
1819 H Street, N.W.
Washington, D.C. 20006



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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 24,545

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Review of an Order of the
Federal Aviation Administration

BRIEF FOR
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ISSUE PRESENTED

Is the Order of the Federal Aviation Administration, dated May 20, 1970, which dismissed the Complaint of Air Line Pilots Association, International, invalid because, as a matter of law, appropriate relief for the regulatory violations alleged by that Complaint should have been granted?

This case has not previously been before the Court.

REFERENCE TO RULINGS

The Order of the Federal Aviation Administration (hereinafter referred to as "FAA"), dated May 20, 1970, which is presented for review by this Court, dismissed the Complaint of Air Line Pilots Association, International (hereinafter referred to as "the Association") (A. 29).¹

That Order was reaffirmed by the FAA on June 23, 1970, when it denied the Association's Request for Reconsideration of Dismissal of Complaint (A. 33).

STATEMENT OF THE CASE

A. Preliminary Statement.

In this proceeding, the Association asks the Court to review and set aside the Order of the FAA (A. 29) dismissing the Association's Complaint, and to remand the matter to FAA with instructions to enter an Order granting the relief sought in that Complaint or other relief deemed appropriate by the Court, upon the ground that such relief is warranted as a matter of law, there being no factual issues in dispute.

1. The administrative proceedings.

Proceedings before the FAA were commenced on February 15, 1970, with the filing by the Association of a telegraphic invocation of FAA's services to deal with this controversy as an emergency matter. Thereafter, on February 19, 1970, FAA set the matter for investigation in accordance with the statutory mandate. On March 5, 1970, in order to assist the Administrator in his investigation, the Association filed a written Statement of Position (A. 2) setting forth the facts in support of its Complaint.²

¹ References to the Appendix are designated "A".

² The Certified List of record documents filed in this Court by Respondent omits any reference to the written exchange of communications on February 15-19 by which FAA's
(cont'd)

Section 1002 of the Federal Aviation Act, as amended, (hereinafter referred to as "the Act") 49 U.S.C. § 1482, provides:

"Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed forces of the United States acting in the performance of his official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken."

The Association's Complaint and Statement of Position alleged that Mohawk, by suspending and otherwise disciplining Mohawk Captains Krouk and Orr for their refusal to undertake certain airline flights which, in their judgment, were unsafe, violated 14 C.F.R. Sections 91.3(a), 91.8(a) and 121.663.

² (cont'd) jurisdiction was initially invoked. The earliest document listed therein is Petitioner's March 5 Statement of Position. During proceedings before the Agency, FAA treated both Petitioner's February 15 wire (see, e.g., A. 16) and Petitioner's March 5 Statement of Position (see, e.g., A. 16, 21, 29) as the "Complaint." The Petition for Review herein describes the February 15 document as the "Complaint," however. Petitioner agrees that its March 5 Statement of Position (A. 2) may properly be deemed its Complaint. For the Court's convenience, and notwithstanding their omission from Respondent's Certified List, the February 15-19 exchange of wires between the parties has been printed as an addendum to this brief.

These sections provide:

91.3 "Responsibility and authority of the pilot in command.

(a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."

91.8 "Prohibition against interference with crewmembers.

(a) No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of his duties aboard an aircraft being operated in air commerce."

121.663 "Responsibility for dispatch release: domestic and flag air carriers.

Each domestic and flag air carrier shall prepare a dispatch release for each flight between specified points, based on information furnished by an authorized aircraft dispatcher. The pilot in command and an authorized aircraft dispatcher shall sign the release only if they both believe that the flight can be made with safety. The aircraft dispatcher may delegate authority to sign a release for a particular flight, but he may not delegate his authority to dispatch."

On April 15, 1970, the FAA's investigator assigned to the matter issued a report (A. 18-21) in which he found the facts alleged by the Association to be "substantially correct" (A. 18). Nonetheless, the investigator concluded as a matter of law that, even on the basis of the Association's uncontroverted facts, there had been no violation of the Regulations by Mohawk.

By letter dated May 20, 1970, the FAA adopted the findings and conclusions of its investigator and dismissed the Complaint (A. 29). On June 23, 1970, FAA denied the Association's Request for Reconsideration of its dismissal (A. 33).

2. Proceedings before this Court.

The matter is before this Court under Section 1006 of the Act, 49 U.S.C. §1486, which provides:

Sec. 1006(a). "Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

The Act provides specifically in Section 1006(d) and (e), for the power of the reviewing Court, and it prescribes the standard of judicial review:

"(d) Upon transmittal of the Petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate."

"(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so."

B. The FAA's Findings of Fact.

The FAA found the facts set forth in ALPA's Statement of Position (A. 2-15) to be "substantially correct." These facts are as follows:

Mohawk is a certificated common carrier by air and has been subject, at all times relevant hereto, to the requirements of the Act and the Regulations established pursuant thereto. The Association is and has been, at all times relevant hereto, the duly designated and authorized representative of the air line pilots employed by Mohawk.

1. The "Krouk Incident"

On August 2, 1969, Mohawk Captain Bernard Krouk was scheduled to serve as pilot-in-command of Mohawk Aircraft 32J (BAC 1-11 twin-jet aircraft) on Flights 42 and 43 (Albany, New York-Syracuse, New York-Washington, D.C.-Syracuse, New York-Utica, New York- and Albany, New York). On this date weather information reported the existence of severe frontal activity throughout the Mohawk system and thunderstorms along several of the route segments of Captain Krouk's scheduled route of flight (A. 3).

Prior to take-off from Albany, Captain Krouk became aware of several Minimum Equipment List³ placards on the aircraft. The flight release indicated the number 2 top temperature control was inoperative, the right autofueler was inoperative above 5,200 pounds, and the autopilot, though otherwise inoperative, was functional in its "yaw damper mode" only. Taking these facts and the weather conditions into consideration, Captain Krouk believed that the flight could be safely completed. Accordingly, he signed the flight release and departed Albany en route to Syracuse (A. 4).

³ The Minimum Equipment List (MEC) published by FAA provides authority to operate an aircraft on which certain components or systems are inoperative or not in good repair.

During the first leg of the flight, however, Captain Krouk discovered that, contrary to the information which he had been furnished by the Carrier before takeoff, the autopilot was fully inoperative in all modes. Considering this added defect in the light of the then-current weather information,⁴ Captain Krouk concluded that his aircraft could not safely penetrate the line of thunderstorms between Syracuse and Washington until these defects had been corrected by Mohawk's maintenance personnel. Accordingly, while aloft en route to Syracuse, he radioed a request to Mohawk's flight control personnel on the ground to provide autopilot capability at Syracuse, New York, or in the alternative, to provide a replacement aircraft at Syracuse for completion of the flight to Washington (A. 4).

Upon his arrival at Syracuse, Captain Krouk learned that Mohawk had rejected both his requests but nonetheless was requesting that he use the same airplane, without maintenance or repair, to transport the waiting passengers to Washington. Captain Krouk believed that it would be irresponsible and unsafe to continue the flight into an area of known thunderstorm activity with the aircraft in that condition; concluding that he should not risk the lives of his passengers and crew, he accordingly declined to proceed with aircraft 32J (A. 4).

Captain Krouk did, however, offer to fly the aircraft without passengers to Mohawk's maintenance center at Utica, New York, so that the necessary repairs could be performed. Before any arrangements could be made to ferry or otherwise make provision for the movement of the aircraft, however, Captain Krouk was advised by a Mohawk Division Chief Pilot that because of his refusal to proceed to Washington, he was being removed immediately from the line (A. 4).

⁴ Upon encountering turbulent weather, Mohawk's FAA approved operations manual for the BAC 1-11 directs the pilot that:

"In all cases the autopilot should remain engaged, but the height lock must be switched out."

On August 4, 1969, Captain Krouk met with Mohawk management to discuss the circumstances resulting in his removal from the line. A further meeting was scheduled for August 5, 1969, to discuss the maintenance and dispatch discrepancies he had discovered. At this later meeting, Captain Krouk was presented with a letter informing him that he had been removed from flying status for fifteen days for disciplinary reasons and penalized by loss of all pay during that period of time (A. 4-5). As its reason for the disciplinary action, Mohawk informed Captain Krouk that:

"On August 2, 1969, you delayed flight 42 from Syracuse, New York, to Washington, D.C. because of an inoperative automatic pilot. The aircraft, 32J, was an airworthy aircraft. This delay contributed materially to the cancellation of flight 42 and the entire return portion of flight 43 on the same date.

Due to your lack of consideration for the inconvenience caused numerous passengers and the total disregard for the economic impact upon the Company for this action, you are removed from line flying. This removal, with loss of all pay for a period of fifteen (15) days will become effective on August 2, 1969 and extend through August 16, 1969." (A. 13-14).

2. The "Orr Incident"

A similar incident occurred some six months later, on January 28, 1970. On that date, Captain Robert Orr was scheduled to command Mohawk Flight 158 from Buffalo, New York to Newark, New Jersey, using Mohawk aircraft 28J, also a BAC 1-11 twin jet. Earlier in the day, aircraft 28J had been used for Flight 132, Buffalo to Newark and Flight 131, Newark to Buffalo to Toronto. Flight 158 had left Toronto en route to Buffalo, where Captain Orr was to assume command for the flight to Newark when the incident occurred.

Upon his arrival at the airport, Captain Orr learned that Flight 158 had encountered severe turbulence on descent and approach to Buffalo and

consequently would be 25 minutes late. Earlier, at his home, Captain Orr had received reports of high winds and freezing rains along his planned Buffalo-Newark route. A follow-up check at the airport produced updated information from pilots and the Mohawk dispatch office showing moderate to severe turbulence between Buffalo and Newark (A. 5).

When Captain Orr read the flight release of aircraft 28J, he discovered that the aircraft had been released with an inoperative autopilot. Captain Orr then phoned the dispatch office to determine the present status of the autopilot. He was assured by dispatch that Mohawk's Chief Pilot had checked the autopilot earlier in the day and found that it operated properly except for a tendency to disengage more easily than normal (A. 6).

Still concerned, Captain Orr asked the dispatcher at Buffalo to check with the Mohawk Captain assigned to fly aircraft 28J from Toronto to Buffalo, to determine the status of the autopilot. Since Captain Orr could ask the Captain in person upon his arrival in Buffalo, it was decided not to call Toronto and possibly delay Flight 158. Captain Orr then proceeded to complete a weather briefing and the flight plan for his trip (A. 6).

With Flight 158 arrived in Buffalo, Captain Orr entered the cockpit and inquired about the status of the autopilot. He was informed by the Captain that the autopilot was totally inoperative. Captain Orr was further advised that no attempt had been made to use the autopilot because the master switch had been turned off and the circuit breakers had been pulled (A. 6).

Captain Orr then phoned Utica maintenance and was once again assured that Mohawk's Chief Pilot had flown the aircraft earlier and had reported it functional except for a tendency to disconnect more easily than normal. Learning this, Captain Orr requested that maintenance personnel reconnect the autopilot and certify it as operative before accepting the aircraft for flight through reported and confirmed turbulent conditions. Maintenance advised Captain Orr that this would present no problem since the Chief Pilot's earlier check of the aircraft would provide sufficient information in the log book to

reinstate and sign off the autopilot. But when Captain Orr and Mohawk's mechanic returned to the aircraft to reinstate the autopilot, their examination of the log book revealed that the aircraft's autopilot had not only *not* been checked that day by the Chief Pilot, but no entries had been made since January 26, 1970. On that date, the equipment had been listed as inoperative. Captain Orr then requested the mechanic to check the matter out with Mohawk's maintenance base in Utica. (A. 6-7).

The passengers of Flight 158 were advised by Captain Orr that there would be a delay for mechanical reasons before departing for Newark. Arrangements were made by Captain Orr with the Buffalo dispatch office to obtain a substitute airplane. A clean aircraft with no known inoperative components was available in Buffalo and Captain Orr prepared to utilize it for the continuation of Flight 158. Prior to departure, however, Captain Orr was notified that the Mohawk Chief Pilot (the same person who had reported, earlier that same day, that the autopilot on 28J was functioning properly) wished to speak with him by telephone (A. 7).

During their phone conversation, the Chief Pilot offered no explanation for the discrepancies encountered but asked only whether he (Captain Orr) was refusing to fly the aircraft. When Captain Orr replied that he considered it unsafe and irresponsible to fly an aircraft with a totally inoperative autopilot into an area of known moderate to severe turbulence, the Chief Pilot advised that he had no choice but to immediately remove Captain Orr from flight status.

After a brief Company investigation, Captain Orr, by letter dated January 29, 1970, was suspended from service for fifteen days with loss of all pay. This disciplinary action was imposed by a letter from Mohawk's Chief Pilot, which stated:

"On January 28, 1970, you refused to fly flight 158 from Buffalo, New York to Newark, New Jersey because of an inoperative auto pilot. This refusal on your part to fly

this flight caused a one-hour-and-twelve-minute delay at Buffalo awaiting a replacement captain to fly this flight.

Due to your lack of consideration for the inconvenience caused numerous passengers and the total disregard for the economic impact upon the Company for this action, you are removed from line flying. This removal with loss of pay, is for a period of fifteen days and is effective January 28, 1970 through February 11, 1970." (A. 14-15).

On February 15, 1970, the Association initiated these proceedings before FAA.

C. The FAA's Conclusion and Order

Despite the absence of any factual disagreement, the FAA found no fault with Mohawk's disciplinary reprisals and economic sanctions against Captains Krouk and Orr for their refusal to undertake flights which, in their judgment, would expose both passengers and crew to dangers which they considered unacceptable.

As previously indicated, FAR §91.3(a) provides:

"The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."

To support its conclusion that Mohawk did not violate this Section, FAA placed the following interpretation on the regulatory language:

"According to the definition in Part 1 of the FARs, the term *operate* with respect to aircraft means, 'Use, cause to use, or authorize to use for the purpose (except as provided in 91.10 of this chapter) of air navigation including the piloting of aircraft with or without the right of legal control (as owner, lessee or otherwise).' Inasmuch as neither Captain Krouk nor Captain Orr (used) operated their aircraft, there could not be a violation of this section.

Moreover, in this instance both Captains in fact were the final authority as to the operation of their respective aircraft in that their decision not to operate was not overcome

by the carrier's threats of reprisal." (Emphasis as in original) (A. 18-19).

In support of its conclusion that Mohawk did not violate Section 91.8(a) by threatening Captains Krouk and Orr with reprisals, the FAA quoted from and interpreted that regulation in the following passage from its Order:

"FAR 91.8(a) Prohibition against Interference with Crewmembers. No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of his duties aboard an aircraft being *operated* in air commerce." (Emphasis as in original.)

"Comment: Again applying the definition of operate we find that the aircraft was not (used) operated which would be a necessary action for sustaining a violation of this section." (A. 19).

Similarly, in failing to find a violation of Section 121.663, which obliges captains to refuse to sign flight releases unless they "believe that the flight can be made with safety," the FAA reasoned:

"In the instances cited . . . , neither Captain Krouk nor Captain Orr agreed that the flight could be conducted in safety; therefore neither undertook to conduct the flight. Since this section requires mutual agreement between the pilot in command and the aircraft dispatcher before the aircraft can be properly dispatched; and since this agreement was not reached; and inasmuch as the aircraft was not (used) operated, there can be no violation of this section." (A. 19).

Finally, FAA seems to have concluded that a pilot-in-command may not properly object to the maintenance condition of his aircraft and must undertake the flight, no matter how many inoperative components may be present, if that airplane satisfies FAA's own minimum equipment list (MEL). Its Order states:

"If demands are made which are in excess of the minimums required by regulation, as in this case, then management

of that company may elect to question your adherence to company policies.

The FAA has certificated the BAC 1-11 aircraft without a requirement for series yaw damper. The FAA-approved MEL permits operations without an autopilot or autopilot yaw damper." (A. 30).

On these grounds, the FAA dismissed the complaint.

ARGUMENT

I

THE SCOPE OF THE CAPTAIN'S AUTHORITY

The airline captain's authority flows not from a contract with his employer, but from the force of law. The authority of the captain concerning the safety of the flight is so intimately related to the safety of public airline transportation that it was properly considered essential for the Government to preempt the airlines, in this instance, from exercising the otherwise-customary employer prerogative of defining the scope of an employee's authority.

Unlike his airline's management, and indeed unlike even the FAA, the airline captain stakes his own life on his best individual judgment concerning the safety of a flight each time he enters the cockpit, and in every case, he puts his judgment to the acid test by going aloft with his aircraft. There are obvious and excellent reasons for placing this ultimate responsibility on one whose interest in the safety of a particular flight is far more crucial than an economic interest. And this, in turn, provides the best possible assurance of safety to the traveling public, for they must necessarily rely upon the judgment and conservatism of the captain when they embark on an airline flight.

By its Order in these proceedings, FAA has approved and encouraged a reversal of these essential principles. By supporting Mohawk's decision to overrule the captain, and thereafter to rest this crucial "go-no go" determination

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on admitted considerations of "inconvenience" and "economic impact" instead of pure safety, the FAA Order has jeopardized the safety and integrity of our national air transportation system.

A. The FAA Order Condonates Mohawk's Violation of its FAA-Approved Operations Manual.

The authority of the captain is established by the Federal Aviation Regulations ("FAR"). These detailed Regulations, designed to regulate air commerce in the interest of safety, govern virtually all aspects of a carrier's operations, and define the authority and responsibility of the captain. Section 91.3(a) provides:

"The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."

and Section 121.663 provides, in relevant part, that:

"The pilot in command and an authorized aircraft dispatcher shall sign the [flight] release only if they both believe that the flight can be made with safety."

In addition to these Sections, Section 121.135 requires the airlines to prepare and keep current manuals which, among other things, must set out the authority of a pilot in a manner which conforms with the requirements of FAA regulations. The provisions of Mohawk's manual persuasively illustrate the virtual unanimity of agreement for the proposition that the captain's "final authority" is indeed applicable to the decision, made before departing, whether a flight can safely be undertaken, and that his authority to make this decision is not reduced or vitiated simply because the aircraft in question has no inoperative "minimum equipment list" components.

Mohawk's BAC 1-11 Operations Manual prescribes in unmistakeable language the authority of the captain with respect to the dispatch of a flight, stating:

"Before any flight may be started, both the Flight Dispatcher and Captain assigned must agree that the flight can be accomplished safely and in accordance with all applicable Company and Federal Regulations."

"The authority which a Captain shall exercise in connection with the operation of the flight to which he is assigned is as follows:

* * * *

Authority to initiate a change in the conduct of the flight, when in the opinion of the Captain, such a change is desirable for reasons of safety.

Authority to delay or discontinue a flight, when in the opinion of the Captain, conditions exist which may jeopardize the safety of flight."⁵

But if any doubt remains as to the scope of the Captain's authority when viewed against the so-called minimum equipment list, Mohawk's Operations Manual conclusively (and properly) gives preeminence to the Captain's judgment:

"The Captain may request equipment requirements above the minimums listed in the manual, whenever, in his judgment, such added equipment is essential to the safety of a particular flight under the special conditions prevailing at the time."⁶

It is therefore clear that the FAA Order under review here reflects FAA approval of conduct by Mohawk Airlines which violates not only FAR Sections 91.3(a) and 121.663, but also the FAA-approved provisions of Mohawk's BAC 1-11 Operations Manual.

⁵ BAC 1-11 Operations Manual, page 2 (November 1, 1967). Mohawk's BAC 1-11 Operations Manuals, of which the Court may take judicial notice, are filed publicly with FAA as required by FAR 121.137(3).

⁶ Operations Manual, page 2, (July 17, 1969).

B. The Captain's Authority under the FAA Regulations.

By their very terms, the previously quoted sections of the Regulations make the captain the final authority with respect to the operation of his aircraft, and unmistakably establish his prerogative to refuse to release an aircraft unless in his own "belief" it is safe to go.

On the other hand, conspicuously absent from both sections is any language which indicates that the captain's authority is either circumscribed or can be superseded. It plainly undermines this clear regulatory policy for a carrier to use threats of disciplinary action to force a captain to take a flight which he considers unsafe, or for the carrier to replace the assigned captain, who has rejected the flight as unsafe, with another pilot who may be more likely to yield under the pressure of threatened discipline.

Despite the unequivocal and unqualified language of these sections, and their clear import, and contrary to the just-quoted provisions of Mohawk's FAA-approved manuals, the FAA has, in this case, interpreted the captain's authority as inapplicable during the period, on the ground, when the decision whether or not to undertake the flight is being made. FAA's view apparently is that the captain *must* execute the flight release, regardless of the circumstances and even though his own best judgment dictates otherwise, if the aircraft components specified in FAA's minimum equipment list (MEL) are in operating condition. FAA has, by this conclusion, brushed aside and submerged the admitted obligation of the Captain not to take off in weather conditions deemed unsafe, even with an aircraft on which all components are fully operative.

Wholly apart from the common sense factors and the obvious regulatory intent to confer ultimate responsibility on the captain for the safe initiation, execution and completion of his flight, the application of simple principles of statutory interpretation demonstrate the fallacy of the FAA interpretation. The regulations prescribing minimum equipment requirements for aircraft exist side-by-side with the regulations which establish and vouchsafe the captain's authority. If the authority of the captain is to have any meaningful content, these regulations must necessarily be construed to confer upon the captain an authority above and beyond simply the mechanical determination whether the carrier has complied with the minimum

equipment requirements. There *must* be a human judgment factor involved. Otherwise the regulatory reliance upon the captain's "belief" that his flight can safely be completed at the time he executes the flight release would be empty of content. There would, under FAA's interpretation, be no need to require that the captain agree to the release of a flight since a pre-flight examination of the mechanical components to determine their operability could be more easily made by a qualified mechanic. In essence, the FAA has, by its Order, removed the captain's judgment from the determination to release a flight as safe.

Similarly defective is FAA's conclusion that the captain's authority provisions of the regulations are applicable only when the aircraft is in "use." Initially, it deserves emphasis that FAA has here overlooked the remainder of Section 1.1 of Part 1, FAR, which defines the term "operate" to mean not only "use," but also to "cause to use or authorize to use aircraft for the purpose . . . of air navigation . . ." When the term "operate" as so defined is then read in the context of FAR §91.3, the pilot's "final authority" is applicable not only to that time while his craft is in use, but equally to the decision as to whether it shall be used at all.

Moreover, the language of related regulations undermines the FAA's narrow interpretation of Section 91.3. FAR Section 121.553(d) provides:

"Each pilot in command of an aircraft is, *during flight time*, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo and airplane." (Emphasis added.)

The terms of this provision limit its application to "during flight time." No such limiting language appears in Sections 91.3(a) or Section 121.663, though such language of limitation would surely have been included if this had been intended. All of these considerations combine to establish that the regulations do indeed confer upon the captain the authority and responsibility to determine whether a flight can be undertaken with safety.

Finally, when, on another occasion, the meaning of Section 91.3(a) was construed administratively, it was stated that the airline pilot in command possessed full authority and responsibility for the safety of his craft "at all times" and not, as FAA now contends, merely while the aircraft is in use. In a draft release interpretation to the predecessor to Section 91.3, the Civil Aeronautics Board stated:

"This [Section] places full responsibility on the pilot for the safety of his flight at all times and provides similar responsibility to that of the captain of a vessel at sea."⁷

C. The Judicial Interpretation of the Captain's Authority.

The FAA's narrow interpretation of the regulations concerning the captain's authority is squarely at odds with the views of the judiciary. In cases involving the responsibility for injury and death resulting from the unsafe operation of aircraft, the courts have made clear that the safety of air travel is dependent upon the authority of the pilot "in exercising the highest degree of care required, to take *whatever precautions are necessary* to guard against dangerous consequences." *Eastern Air Lines v. Silber*, 324 F.2d 38, 40 (5th Cir. 1963) (Emphasis added.)

In *Michelmore v. U. S.*, 299 F. Supp. 1116, 1119 (D.C. Cal. 1969), the Court relied upon Section 91.3 for the conclusion that "A pilot commands his aircraft; his is the final decision as to its operation." The Court then went on to make quite clear that the captain is the only person capable of judging whether a flight can be made with safety and accordingly must retain final authority to determine whether the flight should be undertaken. The Court's holding goes directly to considerations relied on by Captains Krouk and Orr when they refused their flights as unsafe. In the Court's view,

⁷ Civil Air Regulations Draft Release No. 46-5, October 1, 1964, p. 3. The predecessor regulation, CAR §60.101, is identical to FAR §91.3 in all material respects. Prior to the creation of FAA in 1958, the Civil Aeronautics Board was charged with authority to regulate safety in air commerce.

" . . . having information as to contemplated weather conditions when he has been given clearance, the pilot has the responsibility to determine whether it is safe or unsafe to undertake a proposed flight, for he and he alone knows the capability of his aircraft, and he and he alone knows his own qualifications to operate the aircraft."

Similarly, the Fifth Circuit in *Hartz v. U. S.*, 387 F.2d 870 (5th Cir. 1968), has interpreted Section 91.3 to confer upon the pilot the primary responsibility to determine whether a flight can be safely undertaken. The Court stated:

"We recognize that government regulations having the force and effect of law have established that the pilot retains primary responsibility for the movement of his aircraft [Footnote omitted] [citations omitted]." (*Id.* at 873.)

To the same effect, see *Neff v. U. S.*, 282 F. Supp. 910, 922 (D.D.C. 1968).

Although these decisions refer to the Captain's "responsibility," it is, of course, axiomatic that the imposition by law of responsibilities based upon individual judgment must necessarily carry with it the authority necessary to discharge such responsibilities.

D. Expressions from Other Sources Concerning the Content of the Captain's Authority.

The exclusive and final authority of the pilot-in-command to determine whether a planned flight may safely be undertaken has rarely been questioned. In proceedings before the National Mediation Board, prominent Neutral David L. Cole has observed:

"By the very nature of the industry, pilots hold a position of great dignity, authority, and responsibility. The first pilot, or captain, traditionally is not only in command of his ship but he has the last word as to whether it is safe to undertake a flight or to continue it in accordance with the prearranged flight plan. No superior looks over his shoulder prepared to guide him or to correct him. He is in fact the symbol of safety and assurance, and his duty to fill this role has never been questioned. On the contrary,

it has been assumed and encouraged both by practice and regulation. The regulations are those of CAB as well as those of the Carrier.”⁸

The Air Transport Association, the spokesman for virtually all of the Nation’s major airlines, has publicly expressed a similar view. In a submission to FAA in a proposed rulemaking proceeding, the Air Transport Association stated:

“Dispatch rules now afford adequate protection in that the Captain can refuse an airplane because of inoperative components, whenever there are extenuating circumstances. No one is in a better position to make this judgment, as he knows his airplane, the task to be performed, and the weather conditions to be encountered. Airline pilots have the prerogative of refusing a flight with inoperative equipment when conditions dictate, *regardless of MEL requirements*. Applying the Captain’s good judgment to the conditions that prevail seems a more prudent approach than an arbitrary rule requiring a piece of equipment that may not be used on a particular flight.” (Emphasis added.)⁹

In summary, the plain language of FAA regulations and the decisions of the courts, like other informed views, leave no doubt that the preservation of the captain’s ultimate authority concerning the safety of his flight is essential to continued safety in public airline transportation.

⁸ Interim Report and Preliminary Recommendations, National Mediation Board Docket A-4559 (January 26, 1955) at page 3.

⁹ FAA Docket No. 9571; Notice of Proposed Rulemaking, 69-99.

II

THE DECISION OF CAPTAINS KROUK AND ORR NOT TO UNDERTAKE THEIR RESPECTIVE FLIGHTS WAS A PROPER EXERCISE OF THEIR LAWFUL AUTHORITY AND RESPONSIBILITY.

As the admitted facts establish, the decisions of Captains Krouk and Orr to decline the initiation of their assigned flights were based exclusively on their conviction, as mature and conscientious professionals, that the thunderstorms or turbulence which lay across their respective routes of flight could not safely be penetrated by aircraft having a totally inoperative autopilot. As these facts show, it was the combination of the inoperative component and projected turbulence along their routes which caused both captains to conclude that it would be unsafe to undertake the flight. Both Captains were quite willing to proceed with the flight if the yaw damping capability of the autopilot were restored. Indeed, Captain Krouk was willing to assume for himself, though not for passengers, the risks involved in ferrying his aircraft to the Mohawk maintenance center at Utica, New York, for that purpose. That the decisions of Captains Krouk and Orr were made conscientiously and with a sincere concern for safety cannot reasonably be disputed. On the contrary, the sole grounds asserted by Mohawk for its punishment of both Captains Krouk and Orr were "inconvenience" and "economics." (A. 14).

Equally beyond dispute is the existence of a reasonable basis for the respective decisions of Captains Krouk and Orr. In these circumstances it is well recognized that an autopilot is an essential component for the safe operation of the aircraft in turbulent conditions. The need for an operative autopilot in turbulence has been recognized by the FAA as well as other authorities in the field of aviation safety.

On May 6, 1969, only one year prior to the issuance of its Order under review here, the FAA issued a Notice of Proposed Rulemaking to require operative autopilots on all turbojet aircraft used in commercial air transportation. This FAA proposal stated:

§ 121.319 — Autopilots. No certificate holder may operate a turbojet airplane after January 1, 1970, unless that airplane is equipped with an approved autopilot system that is operative in all axes. However, flight may be continued as planned to a place where repair or a replacement can be made in the event that the autopilot malfunctions or becomes inoperative.” (34 F.R. 7333).

As a principal reason for requiring autopilots as a prerequisite for airline operations, the FAA explained:

“The FAA agrees with the contention that an autopilot can be most beneficial to safety. The autopilot can be used to advantage in turbulence to reduce pilot fatigue while providing a constant control which reduces the possibility of momentary upset disorientation, or loss of control. The reduction in pilot workload provided by the autopilot entitles the pilot’s full attention to be concentrated on the duties associated with airway procedures, high density traffic conditions, instrument approaches, and other flight functions.” (*id.*).

The FAA proposal was ultimately withdrawn by FAA on June 22, 1970, following the issuance of its Order in these proceedings,¹⁰ “for further study” after it was opposed by the airlines, principally for economic reasons. While admitting the desirability of the autopilot in turbulent conditions, and likewise admitting that virtually all airline airplanes are equipped with autopilots, the carriers had insisted that the economic cost of autopilot maintenance was not justified by the extent of anticipated need for such equipment as a matter of safety.

Thus, while the FAA now concludes that a pilot may not, in the good faith exercise of his lawful authority, insist upon at least a *partially* operative autopilot before flying into an area of thunderstorms, FAA itself had, just one year earlier, agreed that there was a close relationship between air safety and the use of the autopilot during turbulence.

Likewise, in March, 1970, only two months before issuing its Order dismissing the complaint in this proceeding, the FAA’s Lead Airman Certification

¹⁰ Inexplicably, Respondent designated its June 22 Withdrawal of Notice of Proposed Rulemaking for inclusion in the Record before this Court, and it has accordingly been printed (A. 33) even though by virtue of its date, that Withdrawal could not possibly have been before FAA when it issued the Order under review here. The dubiousness of its credentials for this record are emphasized by the absence of any FAA suggestion that FAA Notice of Proposed Rulemaking 69-19, which was canceled by the June 22 Withdrawal, belongs in this Record as well.

Specialist for the BAC 1-11, (the aircraft type which Captains Krouk and Orr were scheduled to fly), advised Mohawk to instruct its pilots who fly the BAC 1-11, that their first operating procedure upon experiencing "Dutch Roll"¹¹ should be "Engagement of autopilot yaw damper alone (if operative)" (A. 16). In addition, Mohawk's BAC 1-11 Operations Manual, filed with FAA pursuant to FAR §121.137(3), directs pilots to use a prescribed procedure in recovering from Dutch Roll:

"Recovery is accomplished in the following sequence:

- (i) Place both feet flat on cockpit floor.
- (ii) Engage auto pilot yaw damper.
- (iii) Recover manually by use of ailerons only by simply and quickly 'knocking down' the rising wing with a series of aileron inputs of short duration."

(BAC 1-11 Operations Manual, page 16 (June 3, 1969)).

In both the Krouk and Orr cases, the autopilot yaw damper was inoperative.

Other aviation authorities similarly recognize the desirability of autopilot use in turbulent weather conditions. Paul Soderlind, a leading authority on the subject, in his article *Jet Transport Operation in Turbulence*¹² aptly sums up the reasons as follows:

"In severe turbulence, USE THE AUTOPILOT. The autopilot is not fooled by false pitch clues. And it has other advantages. The autopilot is calm and dispassionate and

¹¹ Dutch Roll is a wallowing motion characteristic of swept-wing, jet aircraft, in which the aircraft rolls right and left around its longitudinal axis while yawing right and left around its vertical axis. It is caused by turbulent air or lateral overcontrol and may in fact be worsened by manual attempts to correct or compensate for it. A Boeing 707 aircraft was lost and several of its crew killed by reason of Dutch Roll and improper efforts to recover from Dutch Roll by manual means. (CAB Accident Report File No. 2-1754 (June 13, 1960)).

¹² Pilots Safety Exchange Bulletin 65-103/105, April-June 1965 (Flight Safety Foundation, Inc. New York, New York.).

unaffected by stress; the human pilot is not. The autopilot does not get tired. It is as fresh and efficient at the end of a long flight as it was at the start. Not so the human pilot. Dust dislodged by negative 'g' forces does not get in the autopilot's eyes. When the instrument panel shakes so the instruments are unreadable, the autopilot could care less. The autopilot is not subject to nystagmus. The autopilot is safely force limited in one fashion or another. The autopilot sees every attitude displacement and makes a corrective control input the instant it happens. The human pilot cannot. When the autopilot carries all the control load, the human pilot is free to monitor. It is far easier to monitor than it is to do everything. It is also safer. We find no case where a modern autopilot has lost control of a jet transport in turbulence. We know of several cases where the human pilot has lost control. We know of at least one case where the pilot firmly believes the airplane was saved by the use of the autopilot in severe turbulence."

Similarly, Flight Safety Foundation Bulletin 67-109/110, entitled, "Flying in Turbulence," and written by T. F. Laughlin of the Lockheed-California Company (October/November, 1967), provides, in relevant part:

"This all leads to the conclusion that there is little doubt that the use of the autopilot in moderate or less turbulence is desirable. It also appears that continued use of the autopilot is acceptable in greater turbulence provided its limitations are known and understood, and its operation is monitored. It is neither necessary nor desirable that the autopilot be turned off in turbulence, since it can provide greater control than would be possible if it were not used. Finally, use of the autopilot frees the pilot to more adequately monitor the operation of the airplane, which alone is an important safety factor."

The refusal of Captains Krouk and Orr to undertake flights into turbulent weather conditions with fully inoperative autopilots was thus wholly consistent with recognized and accepted views. Yet FAA insists that it was not contrary

to its regulations for Mohawk to punish these two pilots for acting on these views.

III

BY DISCIPLINING ITS PILOTS-IN-COMMAND FOR THE LAWFUL
EXERCISE OF THEIR AUTHORITY, MOHAWK VIOLATED THE
REGULATIONS AND ENDANGERED THE SAFETY OF THE FLY-
ING PUBLIC.

Absent any reasonable doubt concerning the authority (and indeed the obligation) of Captains Krouk and Orr to decline to undertake flights which they admittedly and conscientiously considered unsafe, or the propriety of their exercise of that authority in the particular instances involved here, it remains only to determine whether it was valid, under the regulations, for Mohawk to punish Captains Krouk and Orr for their conduct.

The FAA's regulations have the force and effect of law. *Hartz v. U. S.*, *supra*, 387 F.2d at 873; *U. S. v. Shultetus*, 277 F.2d 322, 327 (5th Cir. 1960), cert. denied, 364 U.S. 828; *Michelmores v. U. S.*, *supra*, 299 F. Supp. at 1119. Had Captains Krouk and Orr attempted to delegate to Mohawk's management or otherwise rid themselves of their responsibilities for the clearance of their flights, they would likely have been subject to charges under the law, with the possibility of severe legal penalties as a result. Likewise, had either of them signed the flight release notwithstanding their view that the flight should not be undertaken, such action would carry with it an equal promise of legal proceedings against them. Given the admitted belief by both Captains that their assigned flights could not be safely undertaken, punitive action against them either by FAA or by Mohawk, depending upon whether they accepted or rejected the flight, was theoretically inescapable.

Without exception, one who coerces another to violate the law is himself regarded as a violator. Coercion of a captain to violate his legal obligations is expressly prohibited by Section 91.8 of the regulations. This Section provides:

"no person may assault, threaten, intimidate or interfere with a crewmember in the performance of his duties aboard an aircraft being operated in air commerce."

FAA has itself agreed that Mohawk's action here was a "threat of reprisal" (A. 19). It seems undisputed that Mohawk's action against Captains Krouk and Orr constituted a threat, intimidation, or interference with the exercise of the responsibilities imposed upon them by the regulations.¹³

Fortunately, Captains Krouk and Orr were not intimidated by Mohawk. Despite Mohawk's threat and imposition of substantial economic sanctions, both Captains nonetheless discharged their legal responsibility to reject an unsafe flight assignment. Though we can never know whether their action prevented the occurrence of disaster or irreparable consequences, we can be certain that their action was consistent with conservatism and mature and responsible judgment, in a field of endeavor in which those qualities are quite indispensable.

By now, however, all Mohawk pilots are aware of the action taken by Captains Krouk and Orr, and of Mohawk's punitive response to that action. There is absolutely no way to determine how many of the thousands of Mohawk flights which have been operated since the Krouk and Orr incidents, or how many of that carrier's future flights, have been or will be under the command of pilots who have been coerced and intimidated to subordinate their own best judgment in the interest of safety to Mohawk's paramount concern for "inconvenience" and "economic impact."¹⁴

¹³ Threats of economic reprisal interfere with, restrain, and coerce employees in the exercise of statutory rights. *E.g.*, *American Bakery & Confectionary Workers Union v. N.L.R.B.*, ___ U.S. App. D.C. ___, 379 F.2d 160 (D.C. Cir. 1967); *N.L.R.B. v. L. E. Farrell Co.*, 360 F.2d 205 (2nd Cir. 1966); *N.L.R.B. v. Hortex Mfg. Co.*, 120 U.S. App. D.C. 47, 48, 343 F.2d 329, 30 (D.C. Cir. 1965).

¹⁴ ALPA alleged before the FAA that Mohawk's disciplinary action against Captains Krouk and Orr created an atmosphere of fear among its Captains with the result that safety would be severely impaired (A. 11-12). The FAA, however, failed to make any findings of fact on this issue.

Having its own non-delegable responsibility to assure compliance with Federal Aviation Regulations, FAA, by its Order in the proceedings below, defaulted in that responsibility by its failure to recognize that Mohawk's "threats of reprisal" encourage airline pilots to accept flight assignments which, were they evaluated in an objective and neutral atmosphere, might be deemed unsafe and therefore rejected as unacceptable. Mohawk's policy has the purpose and effect of discouraging the independence and conservatism which the regulations demand; FAA's Order placed the FAA seal of approval on Mohawk's unlawful conduct.

Finally, Mohawk's conduct and policy bespeak a reckless invitation to disaster, endangering the lives of unsuspecting airline passengers. Only the Captain is trained and qualified by years of experience to know the relationship between his aircraft, the nature of the tasks to be performed, and the weather conditions to be encountered. Only the Captain is trained and qualified to weigh and balance all the facts and circumstances, in reaching a reasoned judgment and evaluation on which many lives will depend. Yet here, the FAA Order approves the transfer of that critical decision from the expert professional, having an overriding stake in the safety of the flight, to others who have expressed their disproportionate preoccupation with "inconvenience" and "economic impact."

IV

THE FAA'S DECISION IS UNREASONED AND FAILS TO EFFECTUATE THE INTENT OF THE REGULATIONS

This is not a grievance against disciplinary action, nor is any remedy sought here for the damages suffered by Captains Krouk and Orr. By asking this Court to overturn the FAA Order as invalid, Petitioner asserts the public interest, its own interest and the interest of all professional airline pilots in assuring prompt and effective remedial action to dissipate the dangerous atmosphere of intimidation created by the FAA-approved interference, by Mohawk

Airlines, with the lawful authority and independent judgment of the pilot in command.

Safety to human life, not pecuniary gain or economics, is at the heart of the issue raised by the administrative action, and in such a case, this Court has recently held, in *Wellford v. Ruckelshaus*, No. 24,432, ____ U.S. App. D.C. ____, ____ F.2d ____ (D.C. Cir. January 7, 1971) (not yet reported) that:

“ . . . the Court has an obligation to insure that the administrator has made a reasoned decision which conforms with the legislative language and purpose. [Footnote omitted]. And close scrutiny of administrative action is particularly appropriate when the interests at stake are not merely economic interest in a license or a rate structure, but personal interest in life or health. [Footnote omitted].

Equally to the point is the Court's conclusion in *Environmental Defense Fund, Inc. v. Ruckelshaus*, No. 23,831, ____ U.S. App. D.C. ____, ____ F.2d ____ (D.C. Cir. January 7, 1971) (not yet reported) that:

“ . . . courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection in comparison with economic interests at stake in a rate-making or licensing proceeding.”

The interests at stake in this proceeding, related as directly as they are to the lives of the countless hundreds of thousands of travelers who use the Nation's airlines as a means of transportation, deserve, perhaps more than many issues which come before this Court, “a special claim to judicial protection.” The alternative to prompt and effective relief may well be a fatal tragedy,¹⁵

¹⁵ Interpretations of FAA Regulations should be judged “by reflecting on the practical effect of the possible interpretations.” *U. S. v. Miller*, 303 F.2d 703, 707 (9th Cir. 1962), cert. denied, 371 U.S. 955.

whose probable cause may ultimately be found to be "the acceptance by the captain of a flight assignment which he should have rejected as unsafe."

The FAA has acknowledged, and the courts have held,¹⁶ that "Aviation safety is the Federal Aviation Administration's primary mission."¹⁷ Whatever interests may be advanced by the FAA's decision in this case, safety is surely not one of them.

CONCLUSION

For the reasons stated, the Respondent's Order dated March 20, 1970, should be vacated, and the matter remanded to FAA with instructions that an order granting appropriate relief to the Petitioner shall be entered in its stead.

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¹⁶ *Doe v. Dept. of Transportation*, 412 F.2d 674, 678 (8th Cir. 1969).

¹⁷ FAA, 8th Annual Report to the President and to Congress (1966).



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ADDENDUM

(See Footnote 2, at pages 2 and 3)

TELEGRAM

(Dated February 15, 1970)

ADMINISTRATOR JOHN H. SHAFFER
FEDERAL AVIATION AGENCY

MOHAWK HAS IN AT LEAST THREE RECENT CASES TAKEN OR THREATENED DISCIPLINARY ACTION AGAINST CAPTAINS WHO DECLINED TO ACCEPT SPECIFIC PASSENGER FLIGHTS BECAUSE IN THEIR JUDGMENT THE MECHANICAL CONDITION OF THE AIRPLANE RAISED SERIOUS QUESTIONS WHETHER THE FLIGHT COULD BE SAFELY ACCOMPLISHED UNDER PROJECTED WEATHER CONDITIONS OR OTHER CIRCUMSTANCES. EVEN BEYOND THE OBVIOUS FAR VIOLATION IS THE FRIGHTENING LIKELIHOOD THAT OTHER MOHAWK PILOTS HAVE BEEN INTIMIDATED BY THE THREAT OF DISCIPLINARY ACTION SO THAT THEY WILL NOW ACCEPT FLIGHTS WHICH SHOULD OTHERWISE IN GOOD CONSCIENCE AND JUDGMENT BE REJECTED FOR REASONS OF SAFETY. DESPITE OUR REPEATED EXPRESSIONS OF CONCERN TO MOHAWK ON THIS PROBLEM, THE COMPANY CITES ECONOMICS AND CONVENIENCE INSTEAD OF SAFETY AS THE BASIS OF ITS ACTION. WE WANT NO FURTHER DISASTER FOR OUR PASSENGERS OR OURSELVES. YOU MUST ACT NOW TO AVERT POSSIBLE TRAGEDY. WE WILL PROVIDE ALL APPROPRIATE COOPERATION TO THE FAA IN ANY INVESTIGATION.

TELEGRAM

(Dated February 19, 1970)

ALPA MEC CHAIRMAN, 210 ELLEN TERRACE, HACKENSACK H. JER.

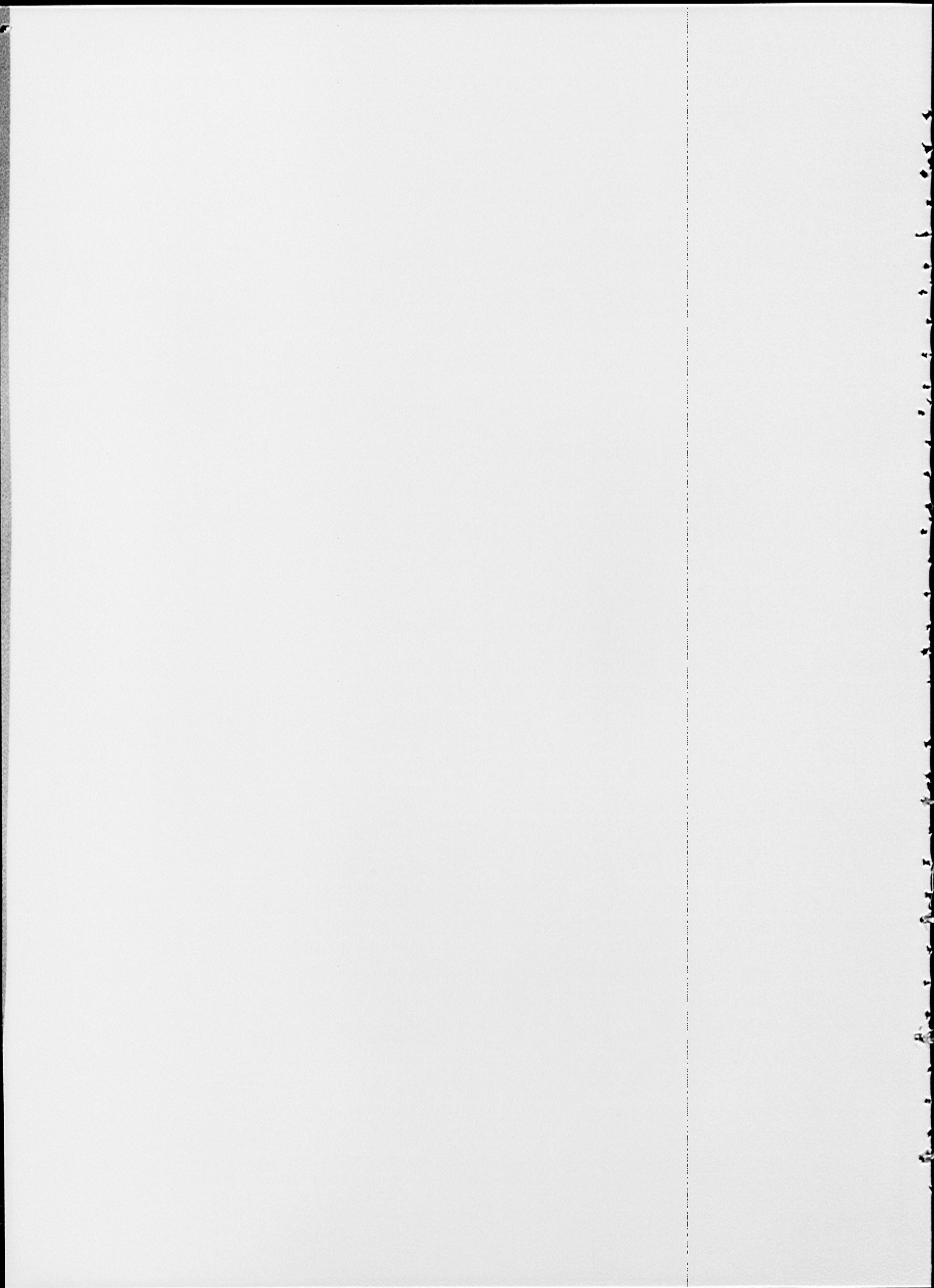
ATTN. MR. JACK MOZIAN

THIS WILL ACKNOWLEDGE YOUR TELEGRAM OF FEB. 1970 TO FAA ADMINISTRATOR, J. H. SHAFFER. I HAVE REQUESTED OUR EASTERN REGIONAL

A-2

HEADQUARTERS TO INVESTIGATE THE CONDITIONS AND PROBLEM AREAS OUT-
LINED IN YOUR WIRE. YOUR COOPERATION IS APPRECIATED. FERRARESE,
FS-400

FAA WASH. D.C.



No. 24,545

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL AVIATION ADMINISTRATION

BRIEF FOR RESPONDENT

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United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 9 1971

Noted by [Signature]
Clerk



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IN THE UNITED STATES COURT OF APPEALS
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No. 24,545

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL AVIATION ADMINISTRATION

BRIEF FOR RESPONDENT

ISSUE PRESENTED FOR REVIEW

Whether the FAA abused its discretion in dismissing, after investigation, the complaint filed by petitioner Air Line Pilots Association against Mohawk Airlines.

STATEMENT OF THE CASE

1. Nature of the Case

The Air Line Pilots Association ("ALPA"), acting under Section 1002(a) of the Federal Aviation Act, 49 U.S.C. 1482(a), filed with the FAA a complaint against Mohawk Airlines (App. 2-15)^{1/}. The basis for ALPA's complaint was that Mohawk Airlines

^{1/}"App." refers to the Appendix to the Briefs, filed pursuant to Rule 30, F.R.A.P. Two telegrams which initiated the investigation were inadvertently omitted from the administrative record filed by the FAA with this Court, and are reprinted in the addendum to petitioner's brief.

has disciplined two of its pilots for refusing to fly a BAC 1-11 aircraft with an inoperative autopilot (ibid.). The FAA has determined that the BAC 1-11 may be safely flown without an operating autopilot (App. 15-16, 23, 30). After investigation, the FAA dismissed ALPA's complaint (App. 29-31, 33). The instant petition for review of the FAA's order of dismissal was filed by ALPA pursuant to Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a) (App. 35).

2. The FAA's Regulatory Provisions for Determining the Instruments and Equipment Necessary for Safe Operation of Aircraft by Commercial Air Carriers

In carrying out his responsibility for fostering air safety (see 49 U.S.C. 1354(a), 1421, 1423, 1425, 1429), the FAA Administrator has adopted regulations which require all aircraft operated by commercial air carriers to carry such instruments and equipment, maintained in good working order, as the FAA has determined is necessary for safe operation. 14 C.F.R. 121.301, et seq. Specifically, the FAA has established a Master Minimum Equipment List ("MEL") for each particular type of aircraft operated by commercial air carriers. See 14 C.F.R. 121.627(c). The MEL lists the instruments and equipment which each type of aircraft must carry, in good working order, for safe operation. In addition, the MEL lists the instruments and equipment which may be inoperative on particular types of aircraft without affecting the safety of the flight. See, e.g., App. 22-28 for portions of the MEL for the BAC 1-11 aircraft.

The procedures for establishing the MEL for each type of aircraft are set forth in Chapter 9 of FAA Manual 8430.6A.^{2/} Section 1550a of the Manual provides for the establishment by the FAA of a Flight Operations Evaluation Board ("the Board") for each type of aircraft. The Board studies the instrument and equipment requirements for safe operation of the type of aircraft for which it is responsible, and prepares a Master Minimum Equipment List ("MEL") for that aircraft. After the aircraft is certified for safe operation by the FAA under 14 C.F.R. Part 25, the aircraft is then governed by the MEL which the Board has established for it. The Board must also continue to evaluate and monitor the aircraft, and the companies using it, throughout its lifetime, and the Board makes such revisions in the MEL as it determines are necessary for safe operation. See Sections 1550b(4)(b), 1550b(5)(f), 1550c(3) of FAA Manual 8430.6A. It should also be noted that, in preparing, monitoring, and revising the MEL, the Board invites and receives the comments and assistance of aircraft manufacturers and users. See Sections 1550b(4)(a), 1550b(5)(b), 1550c(3)(c) of FAA Manual 8430.6A.

The FAA Manual sets out the standards to be followed by the Board in drafting and revising the MEL. Thus, the Manual states

^{2/}Pertinent portions of FAA Manual 8430.6A are printed in the addendum to this brief, infra, pp. 1a-18a.

that "[t]he primary purpose of the Master MEL is to achieve standardized levels of safety on like aircraft" (Section 1550b(7)(e)), and that "[t]he Master MEL shall be compiled under the philosophy that the failure of any of the following instruments or items of equipment must be compensated by other factors which provide an acceptable level of safety or further flight suspended" (Section 1550c(2)(a)). The Manual also notes that "There is some redundancy built into an aircraft by installation of additional equipment not required by regulations" (Section 1550c(2)(b)) and that:

When aircraft are certificated with additional equipment on board which is over and above that required, there is no necessity that such additional equipment be operative if it is in excess of that required for safe operations. All such equipment, however, should be listed on the Master MEL with a zero entered in Column 1 signifying that the item is not required [Section 1550c(2)(d)].

Accordingly, as noted above, the MEL consists of: (1) lists of the instruments and equipment which the aircraft must carry, in good working order, for safe operation, and (2) lists of the instruments and equipment which (through redundancy or compensation by other factors) may be inoperative without affecting the safety of the aircraft.

It should be noted that FAA Manual 8430.6A also provides (Section 1551) that each air carrier must prepare and keep its own Minimum Equipment List ("MEL") for each type of aircraft, and that this MEL, which the FAA reviews and approves, must not be "less restrictive" although it may be "more restrictive" than the Master MEL prepared by the FAA. The FAA Manual provisions

governing the air carrier's own MEL reiterate that "[t]he current agency philosophy is to authorize continuation of flight with inoperative equipment only when the inoperative equipment does not render the aircraft unairworthy for the flight" (Section 1551b(1)).

FAA Manual 8430.6A further provides (p. 1040) that the air carrier's own MEL, which is carried aboard every flight, must contain a "Preamble" which notes, inter alia, that "[e]xperience has proved that the operation of every system or component installed in the airplane is not necessary when the remaining operative instruments and equipment provide for continued safe operations" and that FAA regulations:

provide operators with the authority to operate an airplane with certain items or components inoperative provided an acceptable level of safety is maintained by appropriate operating limitations, by a transfer of the function to another operating component, or by reference to other instruments or components providing the required information.

In sum, FAA regulations provide that each type of aircraft shall be governed by the Master Minimum Equipment List adopted by an FAA Board, and by the aircraft's own Minimum Equipment List, which the FAA reviews and approves. The FAA has also promulgated regulations, affecting all types of aircraft operated by commercial air carriers, which require specified types of instruments and equipment for safe operation. See 14 C.F.R. 121.301, et seq.

3. FAA Regulatory Provisions Concerning the Autopilot

a. The FAA's Master Minimum Equipment List for the BAC 1-11

The Master Minimum Equipment List which the FAA Board established to govern the BAC 1-11 expressly states that "[t]he

whole autopilot system may be inoperative at all times" (App. 23). In the instant case, the Mohawk pilots were concerned about the "yaw damper mode" of the autopilot (App. 4, 7; Brief for ALPA, filed in this Court, p. 21). The "yaw damper" function of the autopilot may also be performed by a separate flight control instrument known as the "series yaw damper". However, the FAA Board's Master MEL provides (with the indication of the number "0" following the item) that the "series yaw damper" is not required to be operative on the BAC 1-11 (App. 24). Thus, as the Master MEL indicates, the FAA has determined that the BAC 1-11 may be safely operated even though its autopilot is totally inoperative, and even though its "series yaw damper" is not operative.

It should be noted that the "series yaw damper" and the yaw damper aspect of the autopilot, serve to dampen the flight phenomenon known as "dutch roll." The record in this case contains the FAA's finding that the BAC 1-11 has a very mild "dutch roll" characteristic because of its construction; that the phenomenon of "dutch roll" will generally dissipate itself after only "a few oscillations" of the BAC 1-11; and that, in any event, one may recover a BAC 1-11 from "dutch roll", even if the autopilot yaw damper is inoperative, "by manual application of aileron alone" (App. 15-16)^{3/}.

^{3/}In its brief filed with this Court (p. 23, fn. 11), ALPA cites the instance of a Boeing 707 aircraft which crashed due to "dutch roll" and "improper efforts to recover from Dutch Roll by manual means". The Boeing 707 is a full swept-wing aircraft, and therefore has a pronounced tendency to "dutch roll". By contrast, since the BAC 1-11 aircraft has "a sweep back of only 20 degrees at the 1/4 cord," it has only a mild "dutch roll" problem, and the FAA has determined that "manual application of aileron alone" is a safe and effective means of dealing with this limited problem (App. 15-16).

After ALPA filed its complaint against Mohawk Airlines, in the instant case, the FAA reviewed its findings set forth in its Master MEL, concerning the autopilot and the series yaw damper. In dismissing ALPA's complaint, the FAA noted that those decisions "were found to be consistent with safe practice" and that Mohawk's own manuals "now reflect those views with appropriate operational and training procedures" (App. 30).

b. FAA proposed Rulemaking for an Autopilot on all Aircraft of Commercial Air Carriers

On April 30, 1969, the FAA issued a notice of proposed rulemaking, stating that it was considering amending FAA regulations "to require all turbojet aircraft operated [by commercial air carriers] under Part 121 [of 14 C.F.R.] to be equipped with an approved autopilot system". 34 Fed. Reg. 7333. The FAA's notice stated that ALPA had petitioned for such a rule, contending that "while virtually all such turbojet airplanes are equipped with autopilots, the lack of a regulatory requirement permits them to be operated with these autopilots malfunctioning or inoperative" (*ibid.*). The FAA notice stated that it agreed with ALPA's contention that "an autopilot can be most beneficial to safety" (*ibid.*)^{4/}. The FAA notice invited all interested persons

^{4/}The FAA notice stated (34 Fed. Reg. 7333):

* * * The autopilot can be used to advantage in turbulence to reduce pilot fatigue while providing a constant control which reduces the possibility of momentary upset disorientation, or loss of control. The reduction in pilot work-load provided by the autopilot enables the pilot's full attention to be concentrated on the duties associated with airway procedures, high density traffic conditions, instrument approaches, and other flight functions.

to participate in the rulemaking proceedings by submitting comments (ibid.).

The rule proposed by ALPA was vigorously opposed by the Air Transport Association of America, which stated in its comments:

* * * * *

There is no question that an autopilot is a most desirable piece of equipment for turbojet aircraft and, as stated in Notice 69-19, virtually all airline turbojet aircraft are equipped with autopilots. It is to the airlines' advantage to maintain such autopilots in good operating condition at all times. Autopilots are most desirable, not only from a crew standpoint, but also as a definite economical aid to the airlines in assuring optimum flight performance in all phases of flight. The autopilot unquestionably provides the two pilots with a valuable backup tool to assist them in their job of flying an aircraft. Further, as stated in Notice 69-19, the airlines agree that under such circumstances as turbulence, complicated airways procedures, high density traffic, and instrument approaches, the autopilot can be in certain circumstances of assistance. The airlines have recognized this fact by the substantial expenditures they have made to equip their aircraft with this equipment even though it has not been a certification requirement.

Until the present time, all equipment listed on the minimum requirements list has been included because it is necessary for aircraft flight safety. The automatic flight systems have not been installed in aircraft for this reason, but as stated above, as a tool to assist the flight crew, to maintain passenger comfort, and to reduce pilot work load. The autopilot cannot be regarded as a safety item essential to the dispatch of the flight [emphasis added]. In fact, the airlines encourage flight crewmembers, especially newly-rated pilots, to fly the aircraft without the autopilot so that they can become more proficient. In addition, there are just as many good reasons for not using the autopilot in all the situations enumerated above as there may be for using them.

No real evidence has been presented by either the petitioner for the rule change or the FAA to support the stated contention that an autopilot is

essential for safety. Only conjecture has apparently been used to support this contention. The petition filed by the Airline Pilots Association (ALPA) for this rule change contains no supporting evidence. * * * Furthermore, to state or infer that flying a turbojet aircraft is unsafe without an autopilot, is just not so. Every pilot is required to show proficiency in all flight regimes under manual conditions [emphasis added].

* * * * *

The unwarranted adverse affect of a rule such as proposed on airline operations can be better dramatized by reference to certain regional carrier operations, particularly on an operation with short segments. A regional carrier overnights many of its aircraft in different cities, many of which are relatively small where maintenance facilities are limited and repairs to complex equipment like an autopilot are not possible. Some of these aircraft may have to fly involved patterns, taking several days before they can reach a maintenance base which is the only place where a substantial repair can be made. If the autopilot is a required go-no-go item, the aircraft would be grounded until technicians could be sent to correct the trouble. There have also been cases where the autopilot will develop problems which cannot be immediately corrected even at the main maintenance base and may require assistance or modification from the manufacturers. These aircraft would likewise be grounded. In this same connection, consideration must be given to the relatively short length type of operations. Possible grounding of aircraft for an average of a 23 minute segment operation in VFR weather for one air carrier is uncalled for.

* * * * *

In conclusion, we must reiterate the fact that the autopilot is not essential for flight safety nor has it been shown that safety will be increased by requiring that the autopilot become a go-no-go item which would be, on the other hand, an excessive maintenance and economic burden on the airlines. [emphasis added]. 5/

5/ALPA's brief, filed in this Court, cites (at p. 20) portions of ATA's letter opposing the proposed rule, which is part of FAA Docket No. 9571, Notice of Proposed Rulemaking 69-19.

And in opposing the proposed rule, Air California stated (emphasis added):

* * * * *

SAFETY

There is no doubt in our mind that autopilot operation is desirable for all potential users. We seriously doubt, however, that safety is adversely affected by outages on short segment flights such as those conducted by Air California. Pilot fatigue is not greatly reduced because, in fact, the autopilot is rarely used for close-in and approach work. The short-haul pilot performs a number of approaches into the same airports where he has a high degree of familiarity further reducing tension and fatigue.

We respectfully submit that although there may be some need for an FAA policy statement regarding autopilot operations on long range flights, a regulation such as proposed is unnecessary and unjust for the following reasons:

1. Safety of flight is not compromised by an inoperative autopilot in one or more axes.
2. Implementation of the regulation would inevitably result in flight delays and cancellations creating an unnecessary burden on the travelling public. 6/

* * * * *

On June 22, 1970, the FAA withdrew its earlier notice of proposed rulemaking, stating that "In light of all the comments 6/The Air California letter is also part of FAA Docket No. 9571, Notice 69-19.

See also the comment of Saturn Airways, part of the same FAA docket, which states (emphasis added);

* * * * *

While we might agree with the contention of the petitioner, the Airline Pilots Association, that the presence of a fully operative autopilot may reduce cockpit workload for the pilot crew, we cannot agree that the presence of the autopilot benefits safety to any degree that can be proven. No proven instance where safety has been compromised by lack of an operative autopilot has been brought to our attention in support of the Airline Pilots Association position.

received, the FAA has concluded that the subject requires further study and that rule-making action on the proposed amendment is not appropriate at this time" (35 Fed. Reg. 10527; App. 33-34).

4. The FAA's Investigation of ALPA's Complaint
Against Mohawk Airlines

On February 15, 1970, ALPA telegraphed the FAA to complain that Mohawk Airlines had recently disciplined pilots "who declined to accept specific passenger flights because in their judgment the mechanical condition of the airplane raised serious questions whether the flight could be safely accomplished under projected weather conditions or other circumstances" (Addendum to ALPA's Brief in this Court, p. A-1). ALPA's telegram also suggested "the frightening likelihood that other Mohawk pilots have been intimidated by the threat of disciplinary action so that they will now accept flights which should otherwise in good conscience and judgment be rejected for reasons of safety." Ibid. The FAA responded, by telegram dated February 19, 1970, that it had requested the FAA's Eastern Regional Headquarters "to investigate the conditions and problem areas outlined in your wire". Ibid.

Thereafter, on March 5, 1970, ALPA filed with the FAA a "Statement of Position" (App. 2-15) which set forth ALPA's contentions concerning the facts and alleged violations of the Federal Aviation Act and FAA regulations by Mohawk Airlines.

ALPA's Statement contended that on August 2, 1969, Mohawk Captain Krouk was scheduled to fly a Mohawk plane (a BAC 1-11) from Albany, to Syracuse, New York, and then on to Washington, D.C., Syracuse, Utica, and Albany, New York; that "weather information

indicated the existence of severe frontal activity throughout the Mohawk system and lines of thunderstorms were reported along several of the route segments" of the flights; and that, prior to takeoff from Albany, Captain Krouk was aware that the auto-pilot was inoperative except "in the yaw damper mode" (App. 3-4)^{7/}. During the first leg of the flight, from Albany to Syracuse, Captain Krouk discovered that "the auto-pilot was inoperative in the yaw damper mode" (App. 4). Based upon current weather information, Captain Krouk "concluded that the frontal activity between Syracuse and Washington could not be safely penetrated with a fully inoperative auto-pilot" (App. 4). Accordingly, Captain Krouk requested that Mohawk furnish his plane at Syracuse with autopilot capability, or provide a replacement aircraft. Mohawk, however, rejected these requests. Captain Krouk then declined Mohawk's request that he continue the flight with the aircraft in its existing mechanical condition, since he had "determined that the flight should not be continued under the circumstances, in the interest of safety" (App. 4). The flight was then cancelled in Syracuse, and Captain Krouk offered to ferry (i.e., to fly the plane without passengers) to Utica, in its current condition. However, Mohawk then advised Captain Krouk that he was immediately suspended from the line (App. 4).

^{7/}Captain Krouk was also advised of the inoperative status of a "number 2 top temperature control" and of the right auto-fueler above 5200 pounds (App. 4). Neither Captain Krouk nor ALPA ever claimed that these defects created any safety problem. Indeed, the FAA's Master MEL for the BAC 1-11 indicates (App. 28) that the inoperative status of the top temperature control does not affect safety, where the "EGT" (exhaust gas temperature) can be controlled by throttle, and ALPA has never claimed that this was not the case here. The autofueler is not on the FAA's Master MEL, thus indicating that it is not necessary at all. (An autofueler is a system whereby all tanks may be fueled through one port; if it is inoperative, the tanks may be fueled individually. The autofueler, thus, does not affect the actual flight of an aircraft).

In his August 6, 1969 letter to Captain Krouk, Mohawk's Division Chief Pilot stated that Mohawk's investigation indicated that while Captain Krouk's BAC 1-11 had "an inoperative automatic pilot," it "was an airworthy aircraft" (App. 13-14). The letter stated that Captain Krouk was suspended from line flying, with loss of all pay, for fifteen days, "due to your lack of consideration for the inconvenience caused numerous passengers and the total disregard for the economic impact upon the Company for this action * * *" (App. 14).

The second incident referred to in ALPA's March 5, 1970 Statement of Position concerned Mohawk Captain Orr who, on January 28, 1970, refused to command a Mohawk flight from Buffalo, New York, to Newark, New Jersey (App. 5-8). After learning that the autopilot on the aircraft (a BAC 1-11) was inoperative, Captain Orr determined that "due to turbulence, it was necessary to reinstate the autopilot before departing for Newark" (App. 7). Again, Captain Orr informed Mohawk that, "[u]nder the present turbulent conditions, he considered it unsafe and would not fly the aircraft with an autopilot inoperative in all modes" (App. 7). Mohawk then advised Captain Orr that he was being removed from the line immediately (App. 8). Another Mohawk Captain then made the flight, without any incidents (App. 14).

On January 29, 1970, Mohawk's Division Chief Pilot notified Captain Orr that he was being removed from line flying, with loss of all pay, for fifteen days, since, in refusing to fly the BAC 1-11 "because of an inoperative auto pilot," he had shown "lack of consideration for the inconvenience caused numerous passengers

and the total disregard for the economic impact upon the Company for this action * * *" (App. 14-15).

After the termination of their fifteen day suspensions, Captains Krouk and Orr were returned to line flying (App. 5,8). There is presently pending "a labor-management grievance proceeding * * * concerning the propriety of Mohawk's actions in imposing the discipline" against Captains Krouk and Orr (App. 5, 8). Indeed, at the present date, Mohawk Airlines and ALPA are now in approximately their eighteenth month of collective bargaining over various issues, including the requirement for an automatic pilot and series yaw damper on the BAC 1-11. It should also be noted that ALPA struck Mohawk Airlines on November 11, 1970.

ALPA's March 5, 1970 Statement of Position contended that Mohawk's disciplinary actions against Captains Krouk and Orr violated the Federal Aviation Act of 1958, and FAA regulations which make the pilot the final authority for determining whether a flight can be made safely (App. 9-11). ALPA also contended that Mohawk's discipline had "created an atmosphere in which no pilot can evaluate objectively and independently the safety of each flight assignment without influence by the threat of punishment" (App. 11). To remedy Mohawk's alleged violations, ALPA requested the FAA to direct Mohawk: (1) to cease and desist from interfering with the pilot's final authority to determine the safety of flights and (2) to notify Mohawk pilots that Mohawk would take no disciplinary action against pilots who exercised that authority (App. 12-13).

On April 20, 1970, the FAA regional supervising inspector notified ALPA that his investigation of its complaint showed that, while the facts alleged by ALPA are "substantially correct", the FAA investigation did not show that Mohawk violated "any of the specific regulations" cited by ALPA (App. 18, 20). He noted, however, that the investigation did "raise the question of the carrier's fitness to continue" to hold its operating certificate "under the atmosphere of hostilities, real and imagined, that are caused by" the "running labor/management disputes" between ALPA and Mohawk (App. 20). The inspector further stated (App. 20):

* * * To examine this proposition would require an effort on the order of a Blue Ribbon Inspection under the authority of section 121.81 [of 14 C.F.R.]. A Blue Ribbon Inspection was had about six years ago on an identical complaint by the pilot group. At that time the FAA was unable to demonstrate a measurable cause/effect relationship on air safety by the dispute. It is our opinion that the situation today is little different than it was then. Therefore, we are not ready, at this time, to recommend such a step. Instead, we would recommend that ALPA be advised of our conclusions on each of the specific areas but without meeting the general issue of "the impact of company harassment on safety" head on.

The inspector concluded by referring to the report of the FAA specialist on the BAC 1-11, which found: (1) that the BAC 1-11 has a very mild "dutch roll" characteristic because of its construction; that the phenomenon of "dutch roll" will generally dissipate itself after only a "few oscillations" of the BAC 1-11; and that one may recover a BAC 1-11 from "dutch roll", even if the autopilot yaw damper is inoperative, "by manual application

of aileron alone" (App. 20, 15-16).

The foregoing comments of the FAA regional investigating inspector were reviewed by the FAA, which, on May 20, 1970, sent ALPA a letter setting forth the results of the FAA investigation of ALPA's complaint (App. 29-31). The FAA letter stated that the facts asserted by ALPA did not demonstrate any violation of the Federal Aviation Act or of FAA regulations (App. 29-30). The FAA letter further stated (App. 30-31):

It is apparent that your problems are in the management/employee relationship area. This is the type of matter which most effectively can be negotiated to a satisfactory conclusion by the parties involved. It is understood that certain steps have been taken by both management and the pilot group to provide for constructive discussions concerning areas of disagreements such as you have presented. That is the best way to resolve the issues which you have brought to our attention.

Where severe grievances remain unresolved, safety in flight operations may be subject to decay. While conditions do not warrant more active participation by the FAA in your situation at this time, surveillance will be continued with the object of determining if safety is maintained at a satisfactory level. Should safety in this area be affected adversely, the entire matter will be reviewed and other means of corrective action sought.

It is unfortunately not always pleasant to carry out one's responsibilities. Regulations require a pilot-in-command to conduct flight operations within the limitations imposed by those regulations. This includes prohibitions against operation of aircraft which are not in an airworthy condition. A professional airline pilot should be able to make such accurate determinations within the operation setting existing at Mohawk Airlines.

If demands are made which are in excess of the minimums required by regulation, as in this case, then management of that company may elect to question your adherence to company policies.

The FAA has certificated the BAC 1-11 aircraft without requirement for series yaw damper. The FAA approved MEL permits operations without an autopilot yaw damper. These decisions were reviewed and were found to be consistent with safe practice. Your company's manuals now reflect those views with appropriate operational and training procedures.

We would be happy to discuss the details of the investigation at any time.

Thereafter, on June 2, 1970, ALPA, by telegram, requested the FAA to reconsider the matter, noting that a third Mohawk Captain (Captain Delmar) had, on May 27, 1970, refused to operate a Mohawk flight through forecasted thunderstorm activity "with fully inoperative autopilot," and that disciplinary action against him was anticipated (App. 32). By letter dated June 23, 1970, the FAA responded that "[a] through review has been made of our position and findings set forth in a letter to you dated 20 May 1970. We wish to inform you that our conclusions are reaffirmed" (App. 33).

On August 17, 1970, ALPA petitioned this Court, pursuant to Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a), to review the FAA's letter of May 20, 1970 dismissing ALPA's February 15, 1970 complaint against Mohawk Airlines (App. 35).

STATUTE INVOLVED

Section 1002(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1482(a), provides in pertinent part:

(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant

thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. * * *

ARGUMENT

THE FAA DID NOT ABUSE ITS DISCRETION IN DISMISSING, AFTER INVESTIGATION, THE COMPLAINT FILED BY PETITIONER AIR LINE PILOTS ASSOCIATION AGAINST MOHAWK AIRLINES.

As noted above, the FAA, after investigation, dismissed ALPA's complaint against Mohawk Airlines, filed pursuant to Section 1002(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1482(a) (supra, pp. 17-18). On the instant petition to review that order of dismissal, the "narrow question" before this Court is whether the FAA "abused its discretion". Flying Tiger Line, Inc. v. C.A.B., 121 U.S. App. D.C. 332, 350 F.2d 462, 465 (C.A.D.C., 1965), certiorari denied, 385 U.S. 945. Accord: Nebraska Department of Aeronautics v. C.A.B., 298 F.2d 286, 295 (C.A. 8, 1962) (holding that Section 1002(a) vests "in the Administrator or the Board, as the case may be, discretionary powers of investigation in response to a filed complaint"); Transcontinental Bus System, Inc. v. C.A.B., 383 F.2d 466, 478 (C.A. 5, 1967), certiorari denied, 390 U.S. 920 ("On petition for review [of a dismissal of a complaint pursuant to Section 1002(a)], the scope of a reviewing court's power is limited to a determination of whether the Board has abused its discretion").

We demonstrate below that the reasons given by the FAA for its dismissal (App. 29-31) were entirely reasonable and well within its discretionary powers.

The FAA's May 20, 1970 letter dismissing ALPA's complaint noted that the facts asserted by ALPA did not demonstrate any specific violation of the Federal Aviation Act or of FAA regulations (App. 29-30). Neither Captain Krouk or Captain Orr actually undertook the flight which they believed to be unsafe; thus, there was no actual interference with their operation of the aircraft. See 14 C.F.R. 91.3(a), stating that "the pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft" and 14 C.F.R. 91.8(a), which provides that no person "may assault, threaten, intimidate, or interfere with a crewmember in the performance of his duties aboard an aircraft being operated in air commerce." Nor did Captains Krouk or Orr actually sign "a dispatch release" for their flight; thus it cannot be contended that they were induced falsely to state their "belief" that "the flight can be made with safety" (14 C.F.R. 121.663).^{8/}

ALPA contends, however, that Mohawk's disciplinary action against Captains Krouk and Orr did violate the spirit of the

^{8/}There is no merit in ALPA's assertion (Brief in this Court, p. 25) that Captains Krouk and Orr "would likely have been subject to charges under the law" if they had "signed the flight release notwithstanding their view that the flight should not be undertaken * * *." As noted below (pp. 20-21), the pilot's view of the equipment necessary for the airworthiness of a plane is beyond the broad area of judgment which FAA regulations have assigned exclusively to him.

foregoing regulations, since it had the effect of coercing them, and other Mohawk pilots, to refrain from exercising their basic responsibility as pilots, viz., to determine whether a particular flight can be made safely (Brief for ALPA in this Court, pp. 16, et seq.). The difficulty with this contention, as the FAA noted, is that Captains Krouk and Orr were not, in the instant case, operating in the broad area of judgment which FAA regulations have assigned exclusively to the pilot.^{9/} Rather, these Mohawk pilots were seeking to exercise judgment in the separate area of certification of the airworthiness of an aircraft, which the FAA has reserved to itself (through the Master MEL and other FAA regulations) and to the air carrier (through the air carrier's

^{9/} See, e.g., Micheltmore v. United States, 299 F.Supp. 1116 (C.D. Calif., 1969), appeal pending, C.A. 9, No. 25,315, where the Court correctly held that the pilot of a small aircraft who was rated for flight under visual flight rules (requiring fair weather) had the sole responsibility for determining whether he should take off in view of the fact that the weather reports indicated that he might meet deteriorating weather which would jeopardize the flight. The other cases cited in ALPA's brief filed in this Court (pp. 18-20) are likewise premised on the assumption that the pilot who has full responsibility is acting within the broad area of judgment reserved to his discretion. A similar premise underlies the CAB Draft Release and the preliminary recommendation of Arbitrator Cole cited at pp. 18-20 of ALPA's brief. While the Air Transport Association may support ALPA's broader view of the area of pilot judgment (ALPA brief, p.20), the FAA's construction of its own regulations is far more persuasive. See Thorpe v. Housing Authority of Durham, 393 U.S. 268, 276 (1969).

own MEL, which may impose standards more severe than the FAA's Master MEL)(supra, pp. 2-11). As the FAA stated (App. 30):

If demands are made which are in excess of the minimums required by regulation, as is this case, then management of that company may elect to question your adherence to company policies.

The FAA has certificated the BAC 1-11 aircraft without a requirement for series yaw damper. The FAA approved MEL permits operations without an autopilot yaw damper. These decisions were reviewed and were found to be consistent with safe practice. Your company's manuals now reflect those views with appropriate operational and training procedures. 10/

Nor did the FAA rest its dismissal of ALPA's complaint on the foregoing grounds alone. The FAA specifically noted that (App. 30):

It is apparent that your problems are in the management/employee relationship area. This is the type of matter which most effectively can be negotiated to a satisfactory conclusion by the parties involved. It is understood that certain steps have been taken by both management and the pilot group to provide for constructive discussions concerning areas of disagreements such as you have presented. That is the best way to resolve the issues which you have brought to our attention.

Where severe grievances remain unresolved, safety in flight conditions may be subject to decay. While conditions do not warrant more active participation by the FAA in your situation at this time, surveillance will be

10/If an air carrier did attempt to coerce a pilot into abdicating his responsibility for judgment in the broad area committed to him alone, the FAA would be faced with the novel question of whether its regulations, which express FAA policy, may form the basis for an enforcement action against the carrier. No such question was presented by the facts of the instant case.

continued with the object of determining if safety is maintained at a satisfactory level. Should safety in this area be affected adversely, the entire matter will be reviewed and other means of corrective action sought.

The FAA's judgment that it should not now intrude itself into the "management/employee relationship area" is perfectly justifiable in view of the pending grievance proceeding over the propriety of Mohawk's disciplinary action against Captains Krouk and Orr, and in view of the continuing collective bargaining between ALPA and Mohawk over various issues, including the requirement for an automatic pilot and series yaw damper on the BAC 1-11 (supra, p. 14). Certainly, the FAA could reasonably conclude that "the best way to resolve the issues" is through continuation of the "constructive discussions" between labor and management. Cf. Flight Engineers, Int'l. v. C.A.B., 118 U.S. App. D.C. 112, 332 F.2d 312 (C.A.D.C., 1964)¹¹. It should be stressed that the foregoing deference to pending labor-management grievance and bargaining procedures was coupled with the FAA's finding that "safety in flight operations" had not decayed (App. 30). Moreover, while the FAA concluded that "conditions do not warrant more active participation by the FAA in your situation at this time," the agency stated that it would continue "surveillance * * * with the object of determining if safety is maintained at a

¹¹/Thus, there is no merit in ALPA's assertions in its brief filed in this Court (pp. 11, 27) that the FAA "found no fault with Mohawk's disciplinary reprisals and economic sanctions" against Captains Krouk and Orr, and that the FAA "placed [its] * * * seal of approval" on Mohawk's conduct.

satisfactory level" (App. 30). And the FAA expressly declared that "[s]hould safety in this area be affected adversely, the entire matter will be reviewed and other means of corrective action sought" (App. 30).

We respectfully submit that the foregoing disposition of the matter by the FAA, explained in clear and unmistakable terms, is perfectly sound and reasonable, and that by no means can it be said to constitute an "abuse of discretion". It should also be stressed, as the FAA found (App. 30), that safety is in no way involved. As previously noted (supra, pp. 5-7), the FAA has determined that the BAC 1-11 may be safely flown without an operating autopilot. The FAA's finding was not challenged by ALPA before the FAA, nor has ALPA challenged that finding in its brief filed with this Court. While ALPA continues to maintain that other Mohawk pilots have been "intimidated" into accepting flights which they consider to be unsafe (ALPA Brief in this Court, p. 26; App. 11-12), ALPA does not support this contention with any concrete evidence. The FAA appropriately rejected ALPA's unsupported contention, finding that "safety in flight operations" had not decayed (App.30). Further, as noted above, the FAA has expressly declared that it will maintain

"surveillance" to assure that "safety is maintained at a satisfactory level" (App. 30).^{12/}

It need only be added that the FAA's clear and reasonable explanation for its dismissal of ALPA's complaint (App. 29-31) belies ALPA's assertion in its brief filed in this Court (pp. 27-29) that "the FAA's decision is unreasoned".^{13/} ALPA's

^{12/}In its brief filed with this Court, ALPA contends (pp. 14-15) that Mohawk Airlines violated Mohawk's own, FAA-approved, Operations Manual. Since the issue was not raised before the FAA (see App. 2-13, 18-21, 29-33), it is not before this Court. United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952). If the issue had been raised, the FAA might reasonably have determined: (1) that Mohawk's alleged violation of its own Operations Manual would best be explored in the pending grievance and collective bargaining proceedings, or (2) that Mohawk's construction of its Operations Manual was correct -- viz., that Mohawk pilots cannot refuse to fly Mohawk planes which meet the safety standards set by the FAA's Master MEL and Mohawk's own MEL. None of the provisions of Mohawk's Operations Manual cited by ALPA support its contention that Mohawk recognized the pilot's authority to refuse to fly an airworthy aircraft because he disagreed with the FAA's and Mohawk's evaluation of the equipment needs of the aircraft.

^{13/}Thus, ALPA mistakenly relies upon Wellford v. Ruckelshaus, C.A.D.C. No. 24,434, January 7, 1971, where the Court held that the Secretary of Agriculture's order refusing to suspend the registration of the herbicide, 2, 4,5-T, for use on food crops, was made: (1) without "careful consideration" of petitioners' allegations regarding "the risk of injury to farm workers or others who might be exposed to the chemical by virtue of its use on food crops" and (2) without assigning "sufficient importance to the risk of harm to human lives". Accordingly, the Wellford Court remanded the case to the Secretary for further consideration "and for a decision supported by a reasoned analysis of the relevant factors." Slip Opin., p. 7.

The FAA's clear and reasonable explanation of its dismissal of ALPA's complaint also distinguishes the instant case from Environmental Defense Fund, Inc. v. Ruckelshaus, C.A.D.C. No. 23,813, January 7, 1971, where the Court held that the Secretary of Agriculture's refusal to summarily suspend the registration of DDT was made without "an adequate explanation for his decision" and therefore remanded the matter to the Secretary for "a statement of the reasons for his decision." Slip Opin., p. 20.

real complaint is that it does not like the FAA's refusal to intrude itself into ALPA's labor-management embroilment with Mohawk Airlines. This Court should reject ALPA's present attempt to cause this Court to inject itself into the controversy and to resolve the matter against a party (Mohawk) who is not even represented here.

CONCLUSION

For the reasons stated, the petition for review should be denied.

Respectfully submitted,

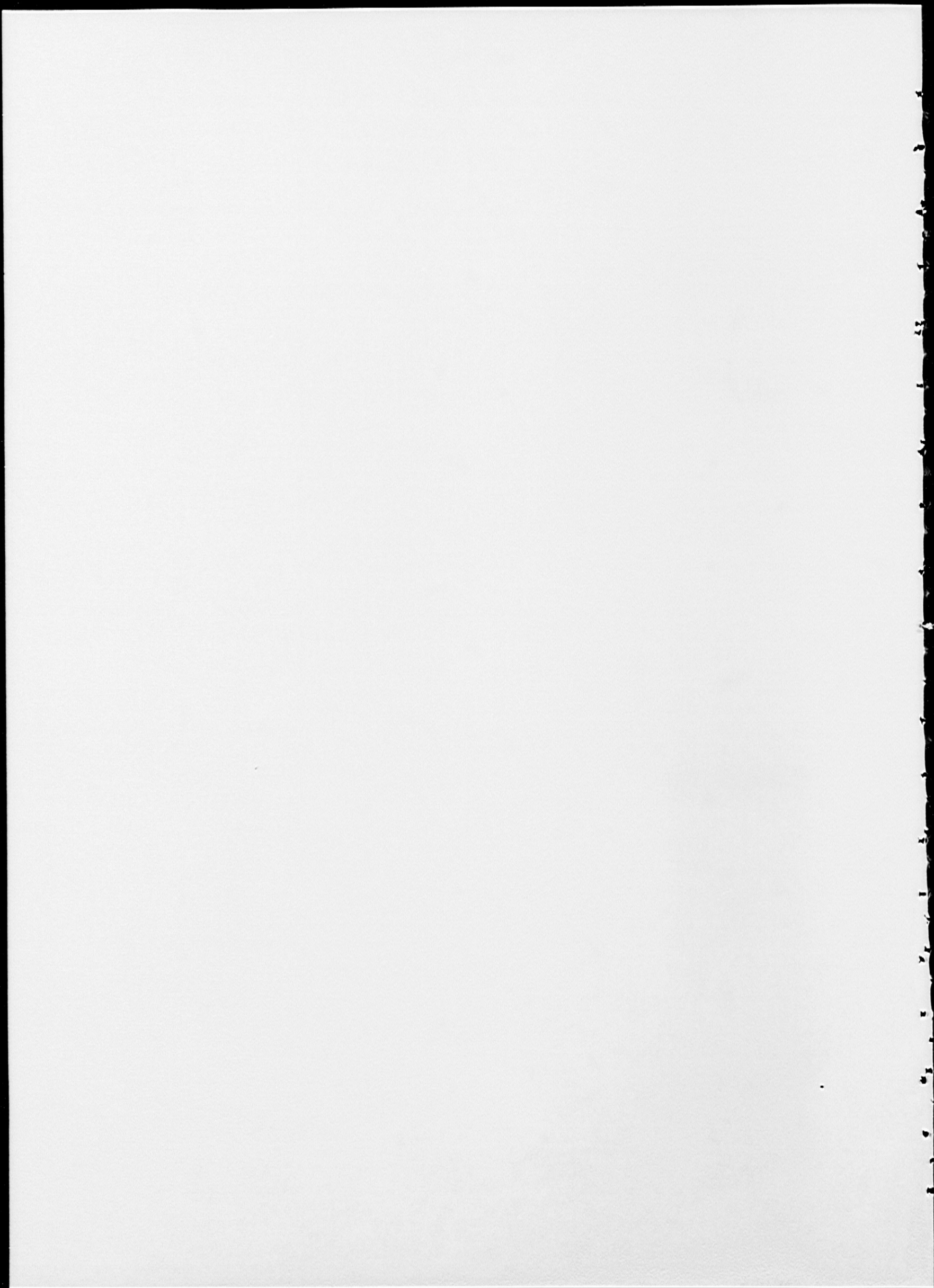
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A D D E N D U M



CHAPTER 9. AIR CARRIER OPERATIONS BOARDS

1550. FLIGHT OPERATIONS EVALUATION BOARD AND THE MASTER MINIMUM EQUIPMENT LIST.

a. Establishment of Flight Operations Evaluation Boards (FOEBs).

- (1) The Chief, Flight Standards Division of the region responsible for the type certification of transport category aircraft establishes an FOEB for each such aircraft type. However, in the case of foreign manufactured transport category aircraft, the Chief, Flight Standards Division of the type certification region may by mutual agreement hand off this responsibility to the region which will first authorize the use of the aircraft in FAR 121, 123, or 127 operations.
- (2) It is also the responsibility of the Chief, Flight Standards Division to assure close liaison between engineering personnel assigned to type certification projects involving applications for original, supplemental and modified type certificates and the Chairman of the FOEB.

b. Composition and Functions of the FOEB.

- (1) Chairman. The Chairman of the FOEB will be the Engineering Liaison Operations Specialist assigned to the type certification project by the Chief, Flight Standards Division. In regions where the Engineering Liaison Operations Specialist position has not been established, the Chairman will be the Lead Airman Certification Inspector. The FOEB will continue throughout the useful life of the aircraft.
- (2) Members.
 - (a) The flight test pilot most familiar with the airplane to be certificated.
 - (b) An Air Carrier Maintenance Specialist assigned to the Maintenance Review Board for the same aircraft.
 - (c) An Air Carrier Operations Specialist, if required, to assist the Chairman.
 - (d) An Avionics Specialist assigned to the Maintenance Review Board for the same aircraft.
- (3) Technical Advisors. The Chairman will, when required, request participation of any or all of the following to provide technical assistance and advice to the FOEB:

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- (a) Engineering personnel.
 - (b) Airman Certification Inspectors currently qualified in the type aircraft or assigned to aircraft not yet type certificated -- regardless of regional location.
 - (c) Other FAA personnel who can assist.
- (4) Duties of Chairman.
- (a) Through liaison with the Chairman and members of the Type Certificate Board and the aircraft manufacturer, schedules in a timely manner, meetings of the FOEB, prior to original type certification of an aircraft.
 - (b) Calls meetings of the FOEB after issuance of the type certificate as necessary to review operating procedures, recommends changes to the MEL and changes to the original type certificate which may affect flight training requirements. In case changes in flight training requirements may be involved, FS-400 will be notified of the recommended changes.
 - (c) Closely monitors the progress of the type certification project to allow sufficient time for coordination and distribution of the Board's final report well in advance of the introduction of the aircraft into air carrier service.
 - (d) Makes the final decision in cases of disagreement between FOEB members which cannot be resolved. In such cases, the minutes of FOEB meetings should clearly spell out any differences of opinion with pros and cons on the issue to provide the regional Chief, Flight Standards Division, with information on which to base his decision subject to the final review by the Chief, Operations Division, FS-400.
 - (e) Submits the Master MEL draft to all FOEB members and FS-400 for review and comment.
 - (f) Chairs the initial Flight Standardization Board meeting for a newly type certificated aircraft when called upon by FS-400.
 - (g) Advises the Chairman, Type Certification Board, or other appropriate engineering personnel of any actions required to be taken either by FAA or the manufacturer prior to placing the aircraft in service.

(5) Functions and Duties of FOEB.

- (a) Determines whether a type rating should be required for a new aircraft model.
- (b) Prepares and forwards proposed MEL to other regions, manufacturers, and users, as appropriate, for comments and recommendations. These representatives will be invited to meet with the FOEB. Industry representatives may express their views on particular problems; however, only designated FOEB members will participate in decision-making or approval. A formal meeting will be held by the FOEB to resolve differences and approve the MEL.
- (c) Prepares and submits recommendations to the Flight Standardization Board concerning areas to be emphasized in ground and flight crew training programs.
- (d) Reviews and approves the ^{Configuration Information} missing parts list developed by the aircraft manufacturer.
- (e) Reviews the performance and operational characteristics of the aircraft and submits recommendations to the Flight Standardization Board on any anticipated problems in placing the aircraft into air carrier service.
- (f) After the aircraft has been operated in air carrier service for approximately six months, reviews operating procedures, recommends changes to the Master MEL and other related recommendations submitted by FAA personnel or industry.
- (g) Forwards to FS-400 copies of all Service Bulletins and Crew Training Bulletins issued by aircraft manufacturers which deal with operational matters.
- (h) Issues and distributes sufficient copies of the Master MEL and subsequent revisions thereto to the regions and FS-400 (four copies to FS-400).

- (6) Engineering Liaison Operations Inspector. The Engineering Liaison Operations Specialist works directly with FAA engineering personnel in order to provide necessary operational input to type certification projects and supplemental type certification. Participation in STC projects will include Category II flight testing, autoland flight testing, etc. These specialists receive technical guidance from FS-400. As a member of the Type Certification Board, attends meetings and actively participates in engineering flight tests on a non-interference and selective basis to become familiar with the aircraft. Participation in engineering flight tests will

include flying operationally orientated test maneuvers during Functional and Reliability Testing as well as other phases of the type certification flight test program. The latter will be accomplished under the supervision of the Supervisory Flight Test Pilot or Chief, Flight Test Branch. The Operations Specialist's activity during the flight test program should not impose any additional flying hours on the aircraft manufacturer. The amount of flying will be to the extent necessary to discharge their responsibilities as members of the FOEB. Specific responsibilities include:

- (a) Evaluation of flight training and check maneuvers.
 - (b) Review the limitations, normal, abnormal, and emergency procedures and all appropriate supplements, revisions and amendments to the AFM. The AFM will not be approved, revised, supplemented or amended, nor will the type certificate or supplemental type certificate be issued unless the Engineering Liaison Operations Specialist assigned to the certificate project has indicated in writing his approval of the appropriate sections of the AFM.
 - (c) Determines the aircraft equipment which may be inoperative with no degradation to safety during operations under Parts 121, 123 and 127.
 - (d) Review the ^{by inspection} missing parts list developed by the aircraft manufacturer. The missing parts list will not be approved, revised, supplemented or amended unless the Engineering Liaison Operations Specialist assigned to the aircraft or certification project has indicated in writing his concurrence.
 - (e) Conducts flight checks of other FAA inspectors, aircraft manufacturer's pilots, airline pilots and FAA Flight Test Pilots.
 - (f) Determines the operational acceptability of: Aircraft warning systems, i.e., instrument failure warning, landing gear warning, etc., progress or situation displays and any other items or equipment used operationally. In accomplishing this responsibility, the Operations Specialist will coordinate with appropriate engineering personnel.
- (7) Master MEL. The following guidelines will be used by the Board in preparation of the Master MEL:
- (a) A Master MEL will be prepared by the Board for each transport category aircraft and for additional models. The Master MEL will cover day and night VFR and IFR flight conditions and will apply to operations conducted under

FAR Parts 121, 123 and 127, as applicable. FAR 121.627(c) permits required equipment to be inoperative as listed in the certificate-holder's manual if the Administrator finds that literal compliance with these equipment requirements is not necessary in the interest of safety. The FOEB represents the Administrator in such cases. For example, for night operations the DC-8 was certificated with four landing lights. The FOEB may authorize one or more lights to be inoperative on each wing of the airplane provided that the FOEB determines that literal compliance with this equipment requirement is not necessary in the interest of safety.

- (b) The Master MEL shall not include obviously required items such as wings, rudders, flaps, engines, etc. Also, the list should not include items which do not affect the airworthiness of the aircraft such as galley equipment, entertainment systems, etc. However, IT IS IMPORTANT TO NOTE THAT ALL ITEMS WHICH ARE RELATED TO THE AIRWORTHINESS OF THE AIRCRAFT AND NOT INCLUDED ON THE LIST ARE AUTOMATICALLY REQUIRED TO BE OPERATIVE.
- (c) Systems will be listed on the Master MEL; i.e., COMMUNICATIONS SYSTEM, NAVIGATION SYSTEM, P/A SYSTEM. ITEMS OF EQUIPMENT IN EACH SYSTEM WILL BE INCORPORATED in the air carrier's MEL prior to approval by the assigned Principal Inspector. It is emphasized that the FOEB must show on the Master MEL that such items or systems were given due consideration; for example, Chapter 23, COMMUNICATIONS, should contain in Column 2 the remarks: "As required by the regulations or current FAA authorizations." It should be noted that those components of a system required by regulations must be listed on the Master MEL. For example, an integrated flight system should have listed on the Master MEL those components required by the FARs during type certification; i.e., attitude gyros, ASI, VSI, etc. Another example is the DME which is required by the operating rules.
- (d) Correspondence from the field recommending revisions to the Master MEL shall be referred to the FOEB for consideration and approval or disapproval. Requests should follow normal channels in reaching the FOEB. Replies should be promptly handled in the same manner. Each regional and district office must maintain a revision log sheet (Figure 9-3), to insure that Master MELs are kept current for aircraft operated by air carriers and operators under that office.
- (e) The primary purpose of the Master MEL is to achieve standardized levels of safety on like aircraft. Our goal is to have uniform Master MELs, insofar as practicable, for like items on comparable type transport aircraft.

- (8) Flight Operations Evaluation Board Report on Master Minimum Equipment List (RIS: FS 8430-11). The Chairman shall submit a final report to the Washington Office, FS-400, through his regional office. Final reports should contain a brief summary of the proceedings and conclusions of each Board meeting. FAA Form 8430-7, Minimum Equipment List, will be used for the Master MEL and any revisions made to the MEL. Normally, the review by the Chief, Operations Division, will involve screening the proposed Master MEL (or revisions thereto) from the standpoint of national policy and standardization. The region will be notified promptly when this review is finished and if the Chief, Operations Division, does not agree with the contents of the MEL, an immediate revision will be made even though the MEL has already been distributed. That region will then forward copies of the final Master MEL (or revisions) to other regions having program responsibility for the airplane type. FAA Form 8430-7, Minimum Equipment List, may be requisitioned through normal channels (#FSN-0052-696-5000) after December 31, 1969. (See Figures 9-1 and 9-2).

c. Master Minimum Equipment List.

- (1) Background. Prior to the establishment of standard or Master MELs, continuance of flight was authorized to a point where repairs or replacements could be made. This was an indefinite philosophy which resulted in varying degrees of application among different airlines. As an example, PAA could fly around the world with an item of equipment inoperative by having replacement parts available only at New York. On the other extreme, a small air carrier could operate through the rain maintenance base several times daily, resulting in repairs each time. A MEL was approved for one air carrier which stated that the list would be used as a guide, and that the flight could be continued with inoperative equipment not provided for on the MEL if the captain and flight engineer considered it safe.
- (2) Current Philosophy.
- (a) The Master MEL shall be compiled under the philosophy that the failure of any of the following instruments or items of equipment must be compensated by other factors which provide an acceptable level of safety or further flight suspended:
- 1 The minimum for type certification.
 - 2 The minimum required by the operating rules for the existing environmental conditions.
 - 3 Any other item installed on the aircraft that was not evaluated in an inoperative condition during type certification flight tests.

- (b) There is some redundancy built into an aircraft by the installation of additional equipment not required by regulations. This makes for safer operations, but with one redundant piece of equipment inoperative, the level of safety would still be acceptable for the aircraft to takeoff. The agency does not wish to discourage operators in the purchase and installation of additional items of equipment that are not required by the regulations.
 - (c) Rather than make an attempt to define "where" or "when" an inoperative unit is to be repaired or replaced, the Master MEL indicates the minimum equipment required for all flight conditions with the intent that no flight can take off from any airport, in air carrier service, with less than the equipment specified. This is to say, that no distinction has been made between the minimum equipment for dispatch of a flight between originating points of the flight and terminal points of the flight including intermediate stops or continuance of a flight beyond the scheduled terminal of the flight. Careful planning is required on the part of the air carrier or operator concerning proper location of spare parts, maintenance facilities, services, and scheduled overhaul and repair programming; otherwise, the aircraft may become unairworthy for further flight in the event an additional item of equipment fails.
 - (d) When aircraft are certificated with additional equipment on board which is over and above that required, there is no necessity that such additional equipment be operative if it is in excess of that required for safe operations. All such equipment, however, should be listed on the Master MEL with a zero entered in Column 1 signifying that the item is not required.
 - (e) The basic philosophy of the Master MEL as outlined above permits the air carrier sufficient latitude in making up its schedule for a sound program of repairs and parts replacement with a minimum of disruption to operations.
- (3) Changes to the Master MEL. The Master MEL may be revised through the following procedures:
- (a) The operator should submit to his assigned Operations Inspector a written request containing full justification including his provision for an acceptable level of safety for each item requested to be changed on the Master MEL.

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- (b) The Operations Inspector shall carefully review the operator's request, attach his recommendations, together with justification and explanation of his recommendations and forward the request to the Chairman of the appropriate FOEB with copies to concerned area and regional offices.
- (c) Formal FOEB meetings will be held when necessary. Appropriate industry, regional representatives, and the air carriers concerned will be invited to meet with the FOEB the same as when the Master List was originated. After the FOEB has carefully considered the request, the chairman shall reply through channels to the originating office. This office will prepare the appropriate reply to the operator. Revisions to the Master MEL by the FOEB will be issued by that region and forwarded to all regions having responsibility for that type aircraft. FS-400 will review proposed changes as outlined in paragraph 1550.a.(6)(c). Three copies will be forwarded to the Operations Division, FS-400. The Washington Office will maintain a current Master MEL on each type transport aircraft operated under a U.S. operator certificate.
- (d) For purposes of standardization, each Master MEL or Revised MEL shall be arranged as shown in Figures 9-1 and 9-2.
 - 1 When provisions are made in the REMARKS AND/OR EXCEPTIONS column for dispatch with inoperative item(s), those provisions should clearly explain how an acceptable level of safety is attained if not otherwise obvious. For example, an FOEB might determine that a pressurized airplane with one cabin compressor inoperative could be operated safely at or below 25,000 feet if Column 2 contains the remark: "One may be inoperative provided all operations limited to 25,000 feet or below."
 - 2 Whenever a new Master MEL is being reviewed or revised, the FOEB should review other aircraft Master MELs as a guide in achieving standardization.
- (e) Each revision page transmittal should be prepared according to the Sample Minimum Equipment List - Revision Page. (See Figure 9-4).

- 8a -

FIGURE 9-1. SAMPLE MASTER MINIMUM EQUIPMENT LIST, FAA FORM 8430-7

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION MINIMUM EQUIPMENT LIST		Reports Identification Symbol FS 8430-11	
AIRCRAFT: B-707/720		REVISION NO.	PAGE
		DATE: 9/23/69	77-2
SYSTEM & SEQUENCE NUMBERS	ITEM	1. REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT AS PROVIDED IN COLUMN 2	
77. <u>ENGINE INDICATORS</u>		2. REMARKS AND/OR EXCEPTIONS	
1. Tachometer N1		One N1, N2, and fuel flow-meter on the aircraft may be inoperative, provided no more than one of the above for each engine is inoperative	
<p>NOTES: 1. Each new chapter should be started on a new page.</p> <p>2. Pages should be numbered in a chapter; i.e., 77-1, 77-2, 77-3, etc.</p> <p>3. ATA 100 specifications should be used to denote chapters.</p>			

FAA Form 8430-7 (10-69)

GPO 882-463

FIGURE 9-2. SAMPLE MINIMUM EQUIPMENT LIST - REVISION PAGE, FAA FORM 8430-7

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION MINIMUM EQUIPMENT LIST		Reports Identification Symbol FS 8430-11	
AIRCRAFT: DC-8 All Models		REVISION NO. 15	PAGE
		DATE: 9/23/69	78-1
SYSTEM & SEQUENCE NUMBERS	ITEM	1. REQUIRED FOR ALL FLIGHT CONDITIONS EXCEPT AS PROVIDED IN COLUMN 2	
78	ENGINE EXHAUST	2. REMARKS AND/OR EXCEPTIONS-	
-1	Thrust Brakes	4	2 may be inoperative provided that two symmetrically opposite reversers must be operative. See AFM for applicable restrictions and limitations. NOTE: Four reversers must be operative if takeoff and landing runways are other than clean and dry.
-2	Thrust Brake Position Lights	4	2 may be inoperative; however, position lights must be operative for each operative reverser.
-3	Ejectors	0	4 may be inoperative. Inoperative ejectors must be secured in either the extended or retracted position. Any number of ejectors may be secured in the extended position provided the AFM contains performance information appropriate to the number of extended ejectors and the carrier provides satisfactory en route fuel consumption data.
-4	Ejector Indicator Lights	0	4 may be inoperative; however, lights must be operative for each operative ejector.

FAA Form 8430-7 (10-69)

GPO 862-463

FIGURE 9-3. SAMPLE LOG OF REVISIONS

DC-8

Rev. No.	Date	Page No.	Initials
12	1/27/64	Complete Revision	
13	3/20/64	31-1	
14	6/24/64	36-1 and 79-1	
15	9/23/69	78-1	

FIGURE 9-4. SAMPLE MINIMUM EQUIPMENT LIST - REVISION PAGE TRANSMITTAL

Effective: July 1, 1967

REVISION NO. 15

MASTER MINIMUM EQUIPMENT LIST

DOUGLAS DC-8

Purpose: 1. To clarify items 78-1, 2, 3, and 4, and reflect FAA policy on number of required reversers.

Substitute the attached page 78-1 for the respective page in REVISION NO. 12.

1551. AIR CARRIER MINIMUM EQUIPMENT LISTS AND DISPATCH OR CONTINUANCE OF FLIGHT WITH INOPERATIVE INSTRUMENTS OR EQUIPMENT.

a. Background.

- (1) Redundancy. Many air carriers have installed items, such as additional flight instruments, navigation and communications equipment to provide better schedule reliability. For example, a second DME receiver may be installed as redundant equipment to provide increased reliability for continuity of operations.
- (2) Classification. In general, flight instruments, communications equipment, navigation instruments, and airworthiness equipment may be basically classified as:
 - (a) Those not required by the regulations, but installed at the air carrier's option.
 - (b) Those required in the airworthiness regulations (FAR Parts 25 and 29).
 - (c) Those on board the aircraft when presented for type certification and considered as part of the type design. (NOTE: Pieces of equipment made part of the type design are considered an integral part of the airplane and cannot be removed or modified without authorization.)
 - (d) Those required by the operating rules (FAR Parts 121 and 127).

b. Current Agency Philosophy and Policy.

- (1) Inoperative Equipment. The current agency philosophy is to authorize continuation of flight with inoperative equipment only when the inoperative equipment does not render the aircraft unairworthy for the flight. Limitations, procedures and substitutions may be used to provide conditions under which the inoperative equipment will not make the aircraft unacceptable or unairworthy. If the aircraft is safe to take off from an en route stop, it is also safe to take off from a maintenance base. Principal Inspectors should assure that the operator exercises close operational control over the use of the MEL and that procedures are established to assure that no aircraft is dispatched with multiple MEL items inoperative without first determining that any interface between inoperative systems or components will not result in a degradation of the level of safety or an undue increase in crew workload.

- (2) MEL on Board the Aircraft. The regulations require that the air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in the conduct of its operations; the MEL must be carried on board the aircraft. Among other things, the manual must contain en route flight, navigation and communications procedures, including procedures for the dispatch or continuance of flight if any item of equipment required for the particular type of operation becomes inoperative or unserviceable en route. The latter procedures must be approved and should be more complete than a restatement of the Master MEL for each type of air carrier aircraft. MELs should also include requirements of the operating rules as well as airworthiness requirements for flight dispatch or continuance of flight with inoperative equipment.

c. Review of Air Carrier MELs.

- (1) Authority for MEL. As previously mentioned, FAR Parts 121 and 127, authorize the Administrator to permit air carriers to operate with specified unserviceable instruments or equipment when it is determined by a representative of the Administrator that safety can be provided without literal compliance with appropriate regulations. This authority is exercised through the approval of the air carrier's MEL by the assigned Principal Operations Inspectors.
- (2) Adequate MEL Information. The Principal Inspector shall periodically review his assigned air carrier's manuals to insure that adequate information is available to flight crews, dispatchers and maintenance personnel concerning inoperative equipment. He shall emphasize to the operator that the establishment of a comprehensive MEL is to the operator's advantage in the interest of expediting his operations.
- (3) Reviewing the Proposed MEL. In reviewing the preparation and utilization of the air carrier's proposed MEL, the Principal Inspector must assure that the list as prepared by the air carrier is not less restrictive than the Master MEL. It may, however, be more restrictive than the Master MEL, airworthiness directives and operating rules applicable to the air carrier's operation.

- (4) Comparison of Master MEL with Air Carrier Proposed MEL. A Principal Inspector who receives a proposed MEL from an operator for approval should carefully compare the operator's proposed list item by item with the current Master MEL prepared and approved for that type aircraft by the FOEB. It is emphasized that Principal Inspectors may not approve instruments or items of equipment which are less restrictive than authorized by the FAA approved Master MEL. The Principal Inspector will effect such coordination as is needed with all the assigned inspectors (Operations, Maintenance and Avionics) to insure that the air carrier MEL is acceptable.
- d. Guidelines for Principal Inspectors. The regulations require an air carrier's manual to contain criteria on which pilots base decisions concerning whether to continue flight with certain inoperative equipment. The Principal Inspector should use the following minimum guidelines when reviewing an operator's proposed MEL:
- (1) Adequate Instructions to Flight Crews. The carrier's operations manual must contain adequate instructions to the flight crew governing use of the MEL including a brief description of the philosophy on how the MEL was developed. It shall specifically state that if an item on the aircraft becomes inoperative, or an additional item becomes inoperative, that is not authorized on the MEL, the aircraft cannot take off and it is considered to be unairworthy.
 - (2) Placards. Placards, alternate operating procedures and instructions for the isolation of malfunctions must be clear, appropriate and accurate.
 - (3) Approval of Assigned Air Carrier's MEL. The guidelines to be used by the Principal Inspector in approving an air carrier's MEL are (1) any equipment provision in the airworthiness or operating rules which is not complied with shall be compensated for by other factors, such as substitution, restriction or procedures which will provide an acceptable level of safety, and (2) the MEL will not permit operation with any item or combination of items inoperative when a hazardous condition could result from the failure of a single additional item of equipment or instrument. Because of the emphasis on safety, even though the regulations could be interpreted otherwise, items such as escape slides, life vests, life rafts, etc., pertaining to crashworthiness and emergency evacuation may not be included on the MEL.

- (4) Places to Repair or Replace. Principal Inspectors should not require air carriers to repair or replace unserviceable instruments or equipment at specific geographic locations if the air carrier's approved MEL permits operations without them. The air carrier shall be advised that should an additional item fail which does not permit operation in accordance with the operator's approved MEL, further take-offs shall be suspended by the operator until appropriate repairs or replacements are accomplished. Therefore, it is incumbent on the air carrier to establish procedures which will insure that an aircraft will not be grounded at a station without maintenance facilities in the event of an additional failure.
- (5) Comparison of MEL. Proposed air carrier MELs should be carefully compared with not only the Master MEL but all pertinent airworthiness and operational requirements before approval.
- (6) Continuance-of-Flight Procedures. It is necessary that approved procedures be established in the air carrier's manual for continuance of flight with inoperative equipment. These procedures should include definite means for advising the captain of any such condition by having it noted in the logbook and properly placarded as appropriate.
- (7) Required Equipment. The Principal Inspector shall ensure that items of equipment or systems necessary to the route to be flown such as required communications systems, public address systems, instrument approach systems, integrated flight systems, etc., are incorporated in the assigned air carrier's MEL prior to approval; otherwise, BY OMISSION FROM THE AIR CARRIER'S MEL SUCH ITEMS MUST BE OPERATIVE. However, such items normally will not be itemized on the Master MEL (due to the numerous options available to air carriers) but must be recognized on the Master MEL by the FOEB to show that an item or system was not overlooked.

e. Principal Inspector's Responsibilities.

- (1) Review of MELs. Review and approve or disapprove MELs submitted by assigned air carriers or operators for insertion in their manuals. This handbook and the appropriate current Master MEL for the type aircraft shall be followed. The maintenance aspects of the aircraft shall be handled in accordance with Handbook 8310.4.

- (2) Coordination. Coordinate with Maintenance, Avionics, Airman Certification and Air Carrier Operations Inspectors to insure compliance with the air carrier's approved MEL through routine review of logbooks.
- (3) Recommendations. Submit carefully considered recommendations through channels for improvements to this handbook.
- f. Supervising Inspector. The Supervising Inspector has overall responsibility for the administration and technical direction of the inspectors of the office in the accomplishment of these functions and responsibilities within the scope of the authority established by the region.
- g. Preamble. In order to assure that pilots, dispatchers, operations and maintenance personnel fully understand the background and current FAA policy regarding the MEL, Principal Operations Inspectors will assure that the following preamble is contained in the air carrier's or commercial operator's approved MEL.

AIR CARRIER MINIMUM EQUIPMENT LIST

PREAMBLE

An airplane is type certificated with all required equipment in an operating condition. If deviations from this type-certificated configuration and equipment required by the operating rules were not permitted, the airplane could not be flown in revenue service unless all such equipment was operable. Experience has proved that the operation of every system or component installed on the airplane is not necessary when the remaining operative instruments and equipment provide for continued safe operations. Therefore, certain deviations from these requirements are authorized to permit continued or uninterrupted operation of the airplane in revenue flight.

FAR 121.627(c) permits the publication of a MINIMUM EQUIPMENT LIST (MEL) designed to provide operators with the authority to operate an airplane with certain items or components inoperative provided an acceptable level of safety is maintained by appropriate operating limitations, by a transfer of the function to another operating component, or by reference to other instruments or components providing the required information.

For the sake of brevity, the MEL does not include obviously required items such as wings, rudders, flaps, engines, landing gear, etc. Also, the list does not include items which do not affect the airworthiness of the aircraft such as galley equipment, entertainment systems, passenger convenience items, etc. However, it is important to note that ALL ITEMS WHICH ARE RELATED TO THE AIRWORTHINESS OF THE AIRCRAFT AND NOT INCLUDED ON THE LIST ARE AUTOMATICALLY REQUIRED TO BE OPERATIVE.

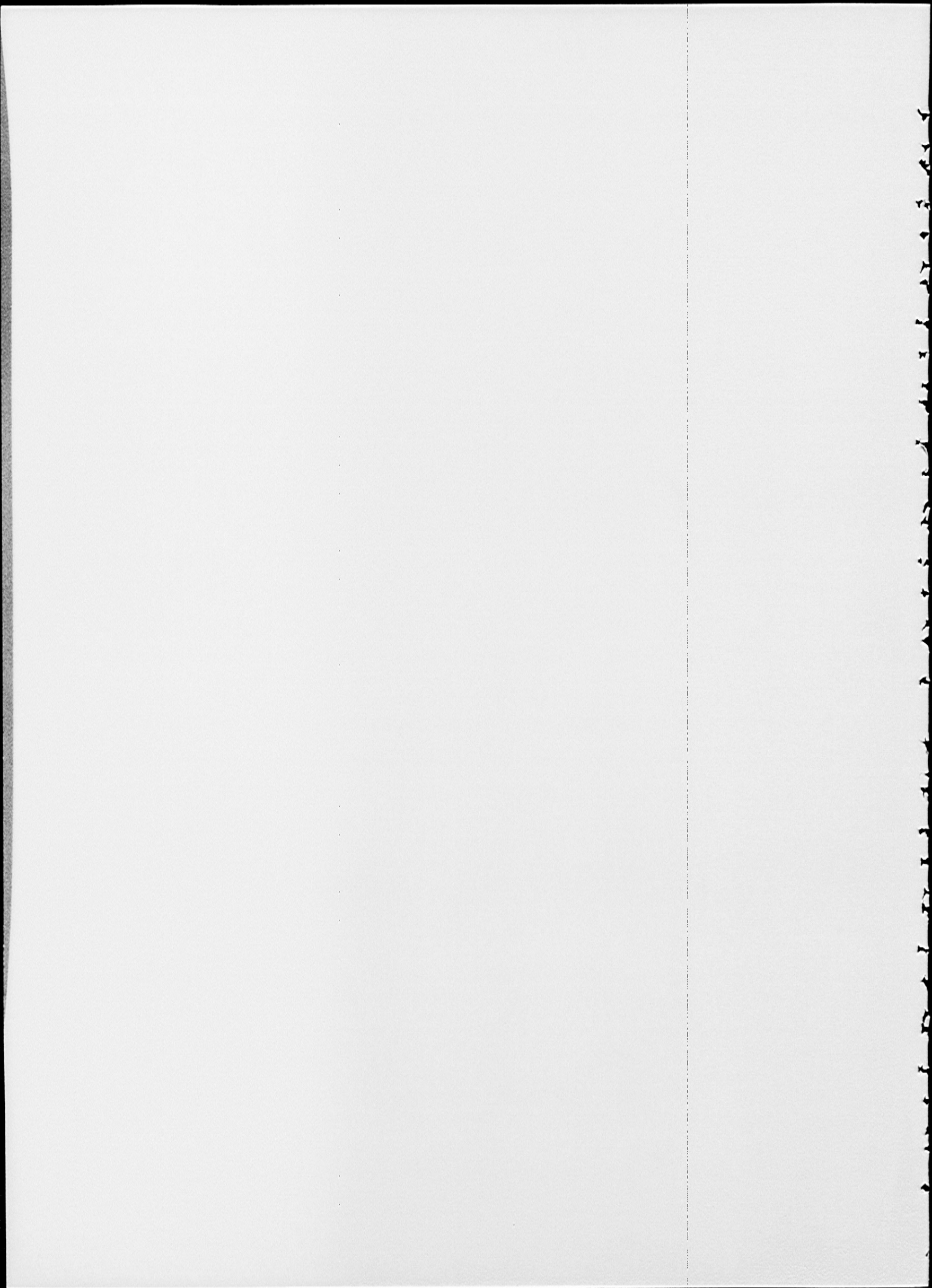
The FAA does not define "where or when" an inoperative item is to be repaired or replaced but rather indicates through approval of minimum equipment lists those instruments and items of equipment that may be inoperative for certain flight conditions with the intent that no flight can take off from an airport with inoperative equipment other than that specified. The failure of instruments or items of equipment in excess of those allowed to be inoperative by the MEL causes the aircraft to become unairworthy. The FAA makes no distinction between the MEL required for dispatch of a flight between points of origin and termination including intermediate stops or flight beyond the scheduled termination of flight. However, it is important that the operator consider making repairs at the first station where repairs or replacement may be made but in any case repair should be accomplished at the terminating station, since additional malfunctions may require the airplane to be taken out of service.

Air carriers are responsible for exercising the necessary operational control to assure that no aircraft is dispatched with multiple MEL items inoperative without first determining that any interface or interrelationship between inoperative systems or components will not result in a degradation in the level of safety and/or an undue increase in crew workload.

The exposure to additional failures during continued operation with inoperative systems or components must also be considered in determining that an acceptable level of safety is being maintained. The MEL was never intended to provide for continued operation of the aircraft for an indefinite period with airworthiness items inoperative.

h. "Grandfather Provisions".

- (1) Air carriers now operating piston-powered transports may exercise the use of a "grandfather provision". Accordingly, existing operators of piston-powered transport airplanes are authorized to use their current MELs provided the lists continue to be acceptable to the assigned principal Inspector.
- (2) The "grandfather provision" also covers those current MELs held by operators of Convair 240/340/440 airplanes which are now powered by turboprop engines (CV-580/600/640) as follows: Operators of piston-powered aircraft converted to turbine power are authorized to use that portion of their current air carrier MEL not affected by the conversion provided the list continues to be acceptable to the assigned Principal Inspector. All items on the operator's current piston MEL which are no longer applicable due to the conversion to turboprop should be deleted. Those items on the new Master MEL resulting from the conversion may be used on the operator's new list.
- (3) Operators of piston-powered and turboprop airplanes only may be authorized MELs which will permit operation with anti-collision lights inoperative to a place where repairs or replacements can be made provided the position lights and flash system are on and operating.
- (4) Cockpit voice recorders are required under Part 121.359 (effective 12/31/66) on large pressurized airplanes with four reciprocating engines. Since Master MELs are not provided for existing operators of these aircraft, a Principal Inspector may approve a revision to his assigned operator's MEL to include the cockpit voice recorder. Column I should indicate that one (1) recorder is required for all flight conditions except as provided in Column 2. The Remarks and/or Exception Column (Column 2) of the MEL should contain the following statement: In the event of malfunctioning or failure of the voice recorder, the airplane may continue the flight, or series of flights but may not depart a station where repairs or replacements can be made.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Review of an Order of the
Federal Aviation Administration

REPLY BRIEF FOR
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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United States Court of Appeals
for the District of Columbia Circuit

FILED APR 2 1971

Nathan J. Paulson
CLERK



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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 24,545

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v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Review of an Order of the
Federal Aviation Administration

REPLY BRIEF FOR
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

I

THE CAPTAIN'S AUTHORITY AND RESPONSIBILITY TO
EXERCISE AN INDEPENDENT JUDGMENT CONCERNING
THE SAFETY OF HIS ASSIGNED FLIGHT IS NOT DIS-
PLACED OR NULLIFIED BY A PREVIOUS MECHANICAL
DETERMINATION THAT THE ASSIGNED AIRCRAFT SAT-
ISFIES FAA AIRWORTHINESS REQUIREMENTS

As the FAA's own findings establish, it was the combination of a totally
inoperative autopilot and the confirmed reports of turbulence or storms along

their assigned routes of flight which caused Captains Krouk and Orr to conclude that it would be unsafe to undertake the flights in question. Despite this undisputed fact, FAA's arguments to this Court suggest that both Captains Krouk and Orr were motivated solely by the mechanical condition of their airplanes; on that erroneous basis, FAA proceeds to argue that airline pilots-in-command exceed their lawful authority when they reject as unsafe a flight assignment in an airplane which satisfies FAA minimum equipment list requirements.

Thus, relying upon provisions of the minimum equipment list which permit operation of the BAC 1-11 with an inoperative autopilot, the FAA contends:

"Captains Krouk and Orr were not, in the instant case, operating in the broad area of judgment which FAA regulations have assigned exclusively to the pilot [Footnote omitted.] Rather, these Mohawk pilots were seeking to exercise judgment in the separate area of certification of the airworthiness of an aircraft, which the FAA has reserved to itself (through the Master MEL and other FAA regulations) and to the air carrier" (FAA Br. p. 20)¹

FAA seems to be asserting that airline pilots in command can never reject as unsafe an assigned flight in an airplane which meets minimum equipment list

¹ In what is apparently a subsidiary argument, the FAA goes on to assert that even:

"If an air carrier did attempt to coerce a pilot into abdicating his responsibility for judgment in the broad area committed to him alone, the FAA would be faced with the novel question of whether its regulations, which express FAA policy, may form the basis for an enforcement action against the carrier." (FAA Br. p. 21, n. 10)

The "novelty" of the question stems, of course, not from any lack of statutory authority to enforce its regulations (See Section 1007(b) of the Act, 49 U.S.C. 1487), but from FAA's inexplicable reluctance to do so. FAA regulations which delegate "final authority" to the captain with respect to the operation of his flight, and protect him from coercion during the exercise of that authority, do not merely "express FAA policy" but, in contrast have the force and effect of law. (See cases cited at p. 25 of the Association's opening brief.)

requirements. If that is FAA's position, then it has effectively nullified the Captain's independent safety evaluation prior to departure, and in doing so, has seriously compromised the safety of our Nation's air transportation systems.

The National Transportation Safety Board, charged with the duty to unearth the cause of aviation accidents so that future disasters can be avoided, does not agree with FAA. In its published reports, it has made quite clear that the role of the Captain's independent judgment, in determining whether a particular flight can be safely undertaken, survives and indeed extends well beyond a determination that the airplane is properly equipped and mechanically airworthy.

In NTSB *Aircraft Accident Report*, Docket SA-393 (1968)² for example, an accident which resulted in the death of all 42 persons aboard a Braniff Airways BAC 1-11, the National Transportation Safety Board determined that the probable cause of the accident was severe turbulence which could have been avoided by delaying or canceling the departure of the flight. (Report at pp. 2, 43, 45, 59.) It reached this determination despite its findings that the aircraft "was properly certificated and airworthy. . ." (*Id.* at p. 6).³ Although the airplane was "airworthy" in the sense that it satisfied minimum

² "Braniff Airways, Inc., BAC 1-11 N1553 Near Falls City, Nebraska, August 6, 1966," *Aircraft Accident Report* (National Transportation Safety Board, Docket No. SA-393, File No. 1-0008, 1968). Contrary to the FAA's implication (FAA Br. p. 6, n. 3), the BAC 1-11 is not immune to turbulent upset. See also "LACSA, BAC 1-11," *World Airline Accident Summary*, p. 18/67 (Air Registration Board, Greville House, Cheltenham, Glos.).

³ Like Mohawk's Operations Manual, Braniff's Manual required that in severe turbulence "in all cases, the autopilot should be engaged . . ." (*Id.* at p. 13). On the Braniff aircraft, "The yaw damper was placarded inoperative [but] continued flight was approved in view of the fact that there is another yaw damper in the autopilot system and the primary yaw damper is not a mandatory item for flight." (*Id.* at Appendix B, p. 1). Unlike the Braniff BAC 1-11s, there was and is no "other" yaw damper on the Mohawk BAC 1-11s. Mohawk had previously eliminated the primary yaw damper from its BAC 1-11 aircraft, for the stated purpose of reducing associated maintenance costs.

equipment list requirements, that fact alone was, in NTSB's view, an insufficient basis for concluding that the flight could safely be undertaken:

"In fact, the dispatcher would have performed his duties more properly had he recommended to the captain that the flight be delayed . . ." (*Id.* at p. 45.)

As a result of this conclusion, the Board recommended:

" . . . that the industry review the implementation of air carrier dispatch procedures with the view toward determining *if the level of safety being achieved in today's operations is considered to be consistent with the intent of existing regulations.*" (Emphasis added.) (*Id.* at pp. 53-54)

What is of particular importance to this case is that the NTSB, following a review, in its Report, of dispatch procedures under present FAA regulations, noted with approval the paramount importance in Braniff's operations of the pilot's independent responsibility to make a final and controlling safety assessment prior to flight:

"During discussions with Braniff dispatchers concerning their duties and responsibilities, they pointed out that their flight planning takes place 2 to 3 hours before the scheduled takeoff time. This planning is based on the weather information available at that time. They also stated the pilot must make the *final decision* regarding his course of action since he can evaluate the situation *existing at the time.*" (Emphasis added) (*Id.* at pp. 13-14)

In another relevant accident case, the Civil Aeronautics Board had to deal with tragic evidence that the exercise of a mature and independent judgment concerning safety, before departure, is indispensable to safety in airline operations. In CAB *Aircraft Accident Report* Docket SA-374 (1963),⁴ a Mohawk

⁴ "Mohawk Airlines, Inc., Martin 404, N449A Rochester, N.Y., July 2, 1963", *Aircraft Accident Report* (Civil Aeronautics Board Docket No. SA-374, File No. 1-0008, 1964). Prior to the creation of the National Transportation Safety Board in 1966, the CAB was charged with the responsibility of investigating aircraft accidents.

Airlines airplane encountered a severe thunderstorm just after takeoff, and seven persons, including the Captain and First Officer, lost their lives in the ensuing crash. In its subsequent investigation, the Board found that Mohawk had vested the final dispatch responsibility in a Customer Service Agent, who inadvertently dispatched the aircraft into the teeth of the thunderstorm (Report at pp. 1, 8-12).

Criticizing Mohawk's dispatch procedures, the Board stated:

"The authority to sign a release is specifically placed in the captain and aircraft dispatcher. Any delegation of this authority must originate or emanate from the possessor of that authority. In this instance there was no proper delegation of authority from an aircraft dispatcher to an authorized Rochester station employee." (*Id.* at p. 10)

* * *

"A dispatch release should be signed by the authorized aircraft dispatcher *only* when he believes the flight can be made with safety. There is a joint responsibility in signing the dispatch release. The captain must also review the documents, analyze their contents, and *independently determine* that the particular flight can be made in safety." (Emphasis added) (*Id.* at p. 11)

If the FAA Order survives this Review, FAA will thereby have effectively deprived the air traveling public of the benefit of the independent judgment of the Captain as the ultimate assurance of flight safety. Instead, the public will be then forced to rely for such assurance upon the mechanical determination that an aircraft's components satisfy FAA minimum equipment requirements. Considerations regarding the environment in which the aircraft will be operated will, with FAA's apparent acquiescence, have to be placed to one side, and established concepts of authority and responsibility in airline flight operations will have to be drastically revised.

II

AS FAA WAS QUITE AWARE WHEN IT DISMISSED THE COMPLAINT AGAINST MOHAWK, THE CONCURRENT USE, IN MOHAWK'S SCHEDULED OPERATIONS, OF AIRCRAFT NOT IN AIRWORTHY CONDITION CREATED AN OVER-RIDING PUBLIC INTEREST IN SAFEGUARDING THE INDEPENDENCE OF THE CAPTAIN'S AUTHORITY.

Petitioner respectfully requests that the Court take judicial notice of a public document discovered in FAA's public records following the filing of Petitioner's earlier brief, and attached as a Rider to this Reply Brief. It is a true copy of a letter from FAA to Mohawk Airlines dated 27 April 1970, describing violations by Mohawk Airlines of several Federal Aviation Regulations all relating to the use, in Mohawk's scheduled operations, of aircraft which were not in airworthy condition. FAA's letter contains an "offer in compromise" to accept a payment of \$50,000 from Mohawk "in full settlement" of the applicable civil penalty requirements of the Federal Aviation Act.

This document is directly material here for the following reasons:

1. The Rider shows that FAA's findings concerning several violations by Mohawk of the existing regulations were issued from its Boston Regional Office on April 27, 1970. In contrast, just over three weeks later, on May 20, 1970, that same FAA Boston Office dismissed the complaint which is the subject of this proceeding, and, in its letter of dismissal, stated:

"We have not been able to find any violations of the Federal Aviation Regulations in the examples provided in the complaint *nor have we been able to determine that Mohawk Airlines did not conduct their operations in accordance with existing regulations.* (A. 29-30) (Emphasis supplied.)

2. The Rider indicates that several of Mohawk's preexisting and continuing violations of regulatory airworthiness requirements in respect to BAC 1-11 type jet aircraft were discovered during an FAA investigation at Mohawk on or about August 13, 1969 (Rider, pars. 2 and 3). Captain Krouk's rejection of an unsafe flight in that same aircraft type occurred just eleven days earlier, on August 2, 1969 (A. 3). The FAA letter makes clear that it was during this same period that these continuing airworthiness violations were found to exist. Yet FAA, in its dismissal of Petitioner's complaint, argued, in effect, that Captain Krouk had no right to go behind or beyond Mohawk's insistence that the BAC 1-11 aircraft assigned to his flight satisfied applicable airworthiness requirements.
3. At pages 20-21 of its brief to this Court, FAA argues that the public is adequately protected in matters of airplane airworthiness by FAA and Carrier supervision of the matter, and that pilots-in-command may properly be made subject to reprisals should they assert their own evaluation of the mechanical condition of the assigned airplane. Yet the Rider discloses that, *in the case of Mohawk, the combined efforts of both FAA and the Carrier failed to prevent the use in scheduled operations of airplanes which were not airworthy.* And, as the Rider further shows (on its final page) this is not the first instance in which discrepancies have been discovered at Mohawk; FAA indicates, in addition, that, following such previous instances, Mohawk failed to "take adequate and effective corrective action at those times."

From these facts, FAA might have been expected to welcome an application of its relevant regulations so as to provide

an added — and, as history showed — a needed safeguard. This seems a particularly appropriate reaction where experience has proven that neither FAA nor Carrier supervision has successfully prevented the unlawful use, in scheduled operations, of airplanes which are not in airworthy condition, and where there is available the judgment of a trained individual who, unlike FAA and the Carrier, is expected to go aloft in the airplane himself.

Instead, however, FAA's opposite interpretation of its regulations seems designed solely to protect the Carrier, leaving the passenger completely exposed.

III

THIS MATTER CANNOT AND SHOULD NOT BE CASUALLY TREATED AS A LABOR RELATIONS MATTER.

FAA has reached the rather surprising conclusion that

“safety is in no way involved”

in this case (FAA Brief, p. 23). A dismissal of the entire matter on the basis that it involves a labor controversy is understandably an attractive basis on which FAA may unburden itself of further responsibility. In this case, however, on the basis of undisputed facts alone, it is an improper basis.

Here, in addition, FAA has sought to bolster its claim that this is a labor dispute by citing, and then repeating, a factual allegation outside the record which is *patently false*. At page 14 of its brief, FAA states:

“Indeed, at the present date, Mohawk Airlines and ALPA are now in approximately their eighteenth month of collective bargaining over various issues, *including the requirement for an automatic pilot and series yaw damper on the BAC 1-11.*” (Emphasis supplied).

At page 22 of its brief, FAA repeated and reemphasized that issues relating to autopilot and yaw damper requirements on BAC 1-11 aircraft were currently being negotiated by Mohawk and the Association:

"The FAA's judgment that it should not now intrude itself into the 'management/employee relationship area' is perfectly justifiable in view of the pending grievance proceeding over the propriety of Mohawk's disciplinary action against Captains Krouk and Orr, and in view of the continuing collective bargaining between ALPA and Mohawk over various issues, including the requirement for an automatic pilot and series yaw damper on the BAC 1-11 (*supra*, p. 14). Certainly, the FAA could reasonably conclude that 'the best way to resolve the issues' is through continuation of the 'constructive discussions' between labor and management."

Let it be settled, here and now, that those issues are not being negotiated, nor have they been negotiated as FAA asserts. FAA has obviously been misinformed.

Moreover, it is quite surprising, indeed, for FAA to express its approval for the negotiation, during collective bargaining, of issues concerning aircraft airworthiness:

"Certainly, the FAA could reasonably conclude that 'the best way to resolve the [autopilot and yaw damper] issues is through continuation of the 'constructive discussions' between labor and management.'" (FAA brief, p. 23.)

This suggests that FAA is willing, even anxious, to have matters of airworthiness taken out of its hands, and disposed of by collective bargaining in labor negotiations. But this assumes erroneously that safety in air transportation is a negotiable item, and that FAA can lawfully delegate its public responsibilities to private negotiators.

Hopefully, this Court will place a different interpretation on FAA's responsibilities under the Federal Aviation Act.

This is not the first time that FAA has chosen to dismiss safety issues by treating them as if they were labor-management problems. On December 19, 1969, former Representative Richard L. Ottinger presented a report to the Congress citing several instances in which the FAA failed to take action in cases in which mechanics were forced by carriers to sign maintenance releases (certifying that airplanes are mechanically airworthy) against their better judgment. (*Congressional Record*, Extension of Remarks, E-10899 (Daily Ed. Dec. 20, 1969)). FAA similarly characterized such situations as disputes between "the company and the employee." (*Id.* at E. 10901.) The Report concluded that because of FAA's refusal to take action against the carriers involved, "the likelihood of a mechanic actually grounding a plane without reprisals is only slightly less improbable than recurrence of the 'Immaculate Conception'." This suggests that the factual situations presented here for review may well represent only the visible portion of an iceberg which permeates and endangers our entire national air transportation system.

CONCLUSION

The public may well owe a debt of gratitude to airline pilots like Captains Krouk and Orr, who have shown the courage, independence and maturity to resist employer reprisals prompted by "economics" and "inconvenience." Without action by this Court to protect such independence and integrity, there may be good reason for concern that such qualities will not hereafter be available in situations where they are needed as a matter of life and death.

The Association respectfully requests that the FAA's Order be vacated, and the matter be remanded to FAA with instructions that an order granting appropriate relief responsive to the complaint shall be entered in its stead.

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RIDER

[27 Apr 1970]

Tel: 617 223-6459

EA-69-MS-68

EA-70-MS-1

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Gentlemen:

We have received two Reports of Investigation which indicate that Mohawk Airlines, Inc., holder of Air Carrier Operating Certificate No. 104, has violated the Federal Aviation Regulations.

The first report establishes the failure of the company to comply with four Airworthiness Directives. The Directives and facts concerning each are set forth below:

1. Airworthiness Directive 69-1-1 pertains to modification of the fire extinguisher systems on FH-227 type airplanes. It requires compliance within 500 hours time in service after the effective date of 1 February 1969. A review of company records revealed five Mohawk FH-227 aircraft were operated in scheduled air transportation for substantial periods beyond the 500 hour compliance time established by this Airworthiness Directive as follows:

<u>Aircraft</u>	<u>Company Compliance Date</u>	<u>Exceeded 500 hour Compliance Time By</u>
N7818M	6-20-69	487 hours
N7820M	6-5-69	334 "
N7821M	5-29-69	340 "
N7822M	6-3-69	356 "
N7823M	6-17-69	487 "

2. Airworthiness Directive 67-22-4, effective 19 August 1967, requires a repetitive functional check of the flap secondary transmission system followed by a visual examination of the transmission shaft joints of BAC 1-11 aircraft at intervals not to exceed 600 hours' time in service from the last inspection.

A review of company records as of 13 August 1969 revealed that aircraft N1112J was 203 hours beyond the required inspection time and aircraft N1114J exceeded the mandatory inspection time by 263 hours. Both aircraft were used in scheduled air transportation during the period they exceeded this inspection requirement.

3. Airworthiness Directive 67-25-2, effective 9 September 1967, requires repetitive inspections of the flap drive screw jacks on BAC 1-11 aircraft at intervals not to exceed 600 hours' time in service from the last inspection. A review of company records as of 13 August 1969 indicated that aircraft N1112J was 203 hours overdue for such an inspection and aircraft N1118J had exceeded the mandatory inspection time by 219 hours. Both aircraft were used in scheduled air transportation during the period they exceeded this inspection requirement.
4. Airworthiness Directive 67-12-4, effective 8 April 1967, requires repetitive 500 hour inspections to detect cracks in the rudder horn assembly on FH-227 airplanes. An examination of company records revealed nine Mohawk Airlines FH-227 aircraft were operated for extended periods beyond the mandatory inspection time as follows:

<u>Aircraft</u>	<u>As of</u>	<u>Exceeded Inspection Time By</u>
N7806M	9-19-69	256 hours
N7809M	10-1-69	940 "
N7810M	9-21-69	906 "
N7812M	9-19-69	110 "
N7816M	9-17-69	1041 "
N7817M	9-17-69	774 "
N7818M	9-24-69	649 "
N7820M	9-20-69	312 "
N7823M	9-16-69	586 "

By reason of the foregoing circumstances Mohawk Airlines violated the following Federal Aviation Regulations:

- (a) Section 39.3 in that the company operated aircraft to which airworthiness directives applied at a time said aircraft did not meet the requirements of such applicable airworthiness directives.
- (b) Section 121.153(a)(2) in that the company operated aircraft which were not in airworthy condition and did not meet the applicable airworthiness requirements of the Federal Aviation Regulations.
- (c) Section 121.367(c) in that the company did not have a maintenance, inspection and alteration program that ensured that each aircraft released to serve was airworthy and had been properly maintained for operation in air transportation.
- (d) Section 91.9 in that by using aircraft in scheduled air transportation which did not meet the requirements of applicable airworthiness directives the company operated said aircraft in a careless manner so as to endanger the lives and property of others.

The second investigative report establishes the failure of the company to comply with the requirements of its Maintenance Manual for inspection and calibration of precision test equipment used in checking the VOR/ILS receivers of company aircraft. The facts concerning each of eight such pieces of test equipment are set forth below:

	<u>Equipment</u>	<u>Inspected & Calibrated</u>	<u>Next Inspection and Calibration</u>	<u>Company Maintenance Manual Calibration Requirement</u>	<u>Exceeds Compliance Time By</u>
1.	VHF Signal Generator Model 211A-(1)	4-29-68	5-29-69	6 months	7 months
2.	VHF Signal Generator Model 211A-(2)	4-29-68	5-29-69	6 months	7 months
3.	Audio Signal Generator Model 479 S-3	4-29-68	8-14-69	6 months	10 months
4.	VHF Signal Generator Model 608D	4-29-68	5-29-69	6 months	7 months

	<u>Equipment</u>	<u>Inspected & Calibrated</u>	<u>Next Inspec tion and Calibra tion</u>	<u>Company Maintenance Manual Calibra tion Require ment</u>	<u>Exceeds Compli ance Time By</u>
5.	L.F. Signal Generator Model 65B	4-29-68	5-29-69	6 months	7 months
6.	L.F. Signal Generator Model 82	4-29-68	5-29-69	6 months	7 months
7.	VOR/LOC Ramp Tester Model SG-13	10-17-67	10-30-69	6 months	2½ years
8.	X Band Test Set Model 624C	2-6-68	12-9-69	12 months	10 months

By reason of the foregoing circumstances, Mohawk Airlines violated the following Federal Aviation Regulations:

- (a) Section 43.13(a) in that by failing to calibrate its test equipment in accordance with the requirements of the company's Maintenance Manual, the company used methods, techniques and practices not acceptable to the Administrator and used test apparatus which was not sufficient to assure completion of work in accordance with accepted industry practices.
- (b) Section 121.367(a) in that the company did not have an inspection program that ensured that maintenance and preventive maintenance of test equipment was performed in accordance with the company's Maintenance Manual.
- (c) Section 121.367(c) in that the company did not have a maintenance and inspection program for test equipment that ensured that each aircraft released to service was airworthy and had been properly maintained for operation in air transportation.

Further, as a result of previous Federal Aviation Administration visits to Mohawk Airlines in 1967 and 1968, similar discrepancies were revealed and the company advised that its inspection and calibration of test equipment was not being performed in accordance with the requirements specified in the company's manuals. From the aforescribed discrepancies it appears Mohawk Airlines did not take adequate and effective corrective action at those times.

Under Section 901(a) of the Federal Aviation Act of 1958, as amended, the company is subject to a civil penalty not to exceed \$1,000 for each day of each continuing violation of a Federal Aviation Regulation. After full consideration of all the circumstances concerning both violations we would be willing to accept an offer in compromise of \$50,000 in full settlement of this matter. An explanation of the compromise procedure is enclosed.

We will take no further action for a period of ten (10) days after your receipt of this letter in order to afford the company an opportunity to submit the suggested offer in compromise.

Very truly yours,

MARTIN J. WHITE
Regional Counsel, EA-7

ORIGINAL SIGNED BY
By: LAWRENCE C. SULLIVAN
Attorney, Boston Area, BOS-7

Enclosure